Petition

81-1008

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No. _____.

In the
Supreme Court of the United States

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented.

Where a city has chosen to combat local unemployment, upgrade inner-city skills, increase neighborhood involvement in city projects, and construct such needed public facilities as streets, schools, and parks through a tax-supported public works employment program:

1. May the city's decision to use only construction firms that make a good faith effort to employ predominantly local crews be struck down under the Commerce Clause solely because some out-of-state firms, as well as some in-state firms headquartered outside the city, might refuse to deal with the city on these terms?

2. May the city's local employee preference be struck down under the Commerce Clause without regard to the interests it serves in reducing commuter absenteeism, encouraging local participation and commitment, narrowing the need to depend on minority quotas, and enlisting neighborhood cooperation in overcoming past discrimination?

3. Does the city lose whatever Commerce Clause immunity it would have enjoyed as a market participant because of the traditionally governmental character of the projects and purposes involved in its challenged contract policy?

4. Does the city lose whatever Tenth Amendment immunity it would have enjoyed in structuring its traditionally governmental activities because of its reliance on private contractors to carry them out?

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Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the

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[1] This petition is filed on behalf of the Mayor of Boston and the City of Boston, defendants below, and the Boston Jobs Coalition, Inc., defendant-intervenor below. The civil action below was commenced on March 20, 1980, in the Supreme Judicial Court for the County of Suffolk. Respondents, plaintiffs below, are the parties identified in the caption and forty-three individuals listed in an Exhibit A appended to the complaint.

Commonwealth of Massachusetts, entered on November 23, 1981, following the opinion of that Court entered on August 28, 1981, declaring violative of the Commerce Clause the Executive Order of the Mayor of Boston requiring that contractors fill fifty percent of the positions on city-funded construction projects with Boston residents.

Opinion Below.

The opinion of the Supreme Judicial Court, dated August 28, 1981 (Appendix A), is reported at [1981] Mass. Adv. Sh. 2039.

Jurisdiction.

Respondents brought this action in the Single Justice session of the Supreme Judicial Court seeking, *inter alia*, to obtain a declaration of invalidity of an Executive Order (Appendix B), dated September 11, 1979, and effective October 15, 1979. After the parties entered into an Agreed Statement of Facts (Appendix D), the case was reserved and reported by the Single Justice to the Full Court without decision. After argument, the Court issued an opinion (Appendix A) on August 28, 1981, declaring the Executive Order void under the Commerce Clause. That opinion was embodied in a final judgment (Appendix A1) on November 23, 1981. This petition is being filed within 90 days of both that date and the date of the opinion below. See *Cole* v. *Violette*, 319 U.S. 581 (1943). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

United States Constitution, Article I, § 8, cl. 3:

"The Congress shall have Power . . . . to regulate Commerce . . . among the several States . . . ."

Statement of the Case.

Petitioners ("the City") seek review of a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, App. 1-18, declaring void an Executive Order[2] ("the order") which confined the City's future public works construction contracts[3] to firms that fill at least half the positions on such projects with local residents[4] whenever feasible[5] regardless of their state of incorporation or place of business. At

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[2] The text of that order appears as Appendix B to this petition. App. 19. A state statute also invalidated below, App. 2 n.3, App. 9-13, is not involved in this petition, nor is the State seeking certiorari to review the invalidation of that statute.

[3] *See* App. 19, ¶4. Out of some $483 million in construction within the city in 1980, approximately $54 million would have been covered by the order, which extends to "any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract." ¶18(b) of Agreed Statement of Facts, App. 42.

[4] As the court below noted, "[n]o challenge has been made to those aspects of the order setting out hiring guidelines based on race and sex." App. 3, n.8.

[5] Paragraph B(5) of the City of Boston Supplemental Minority Participation And Resident Preference Section, App. 25, provides that contractors and subcontractors "shall be deemed to be in compliance with [the paragraphs dealing with women, minorities, and resident employees] if [they have complied with] Section E, paragraph 6" — containing various disclosure requirements — "and [have] demonstrated to the satisfaction of the Compliance Unit and Liaison Committee that [they have] taken all reasonable steps to so comply with the provisions of this Article."

stake in this case is the validity of a central feature of the program for jobs-creation through public works on which the City of Boston has chosen to rely in constructing and refurbishing its public schools, playgrounds, parks, roads, and other municipal facilities.[6]

The relevant facts are not in dispute[7]. As the parties have stipulated, the order had the design and effect of reducing persistent and unusually high levels of inner-city unemployment[8], providing indispensable and otherwise unavailable job skills and experience for local residents[9], increasing the tangible benefits to the City's residents from the local, state, and federal taxes they pay,[10] and reducing absenteeism and tardiness on public construction projects caused by commuting non-resident workers.[11]

The parties further stipulated that, if a trial of fact were permitted,[12] the order might also be shown to reduce local an-

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[6] See note 3 *supra*. Defendant intervenor Boston Jobs Coalition, Inc., "a coalition of [some] 42 community, labor and minority organizations," has always had, as a primary goal, "urg[ing] government, labor, and construction industry officials to make more construction jobs available to minority workers . . . and Boston residents," and has "negotiated with the City of Boston over the past six years for the promulgation of the Executive Order subject to challenge." Agreed Statement of Facts, ¶4(a), App. 33-34.

[7] *See* Agreed Statement of Facts, App. 30.

[8] *Id.* ¶¶ 7(a), (b), 9(a), (b), App. 35, 36. Unemployment in the City of Boston averaged 12.8% in 1975 compared with a national average of 8.5%, 11.1% in 1976 compared with a national average of 7.7%; 9.5% in 1977 compared with a national average of 7.0%; 7.2% in 1978 compared with a national average of 6.0%; and 6.5% in 1979 compared with a national average of 5.8%. *See* Exhibit J to Appendix II to Agreed Statement of Facts (source: U.S. Bureau of Labor Statistics; Mass. Div. of Employment Security).

[9] *See* Agreed Statement of Facts, ¶9(g), App. 36.

[10] *Id.*, ¶¶ 7(c), (d), 9(c), (d), App. 35-36.

[11] *Id.*, ¶9(f), App. 36.

[12] The case was instead disposed of on a record of stipulated facts.

tagonism and neighborhood vandalism against municipal construction sites,[13] to enhance local commitment to the success and quality of the City's projects,[14] and to alleviate tensions that are caused by, and may obstruct the progress of, municipal efforts to overcome past discrimination in local construction activities.[15] In particular, although the order also included "hiring guidelines based on race . . . ."[16] — guidelines not themselves involved in this case[17] — the local hiring preference reduced the need to rely on racial quotas to remedy prior discrimination. For, as the parties stipulated, "the effects of the residency aspects of the . . . Order include . . . . [c]orrelation of the ethnic and racial composition of construction workers on affected projects with the ethnic and racial make-up of the City."[18]

The state's highest court mentioned few of these objectives and effects of the challenged order, adverting to most of them not at all[19] and treating those that it did mention as irrelevant on the ground that the local hiring preference, which the court wrongly described as a "strict numerical requirement,"[20] was not precisely enough "targeted" to the interests advanced in its defense.[21]

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[13] *See* Agreed Statement of Facts, ¶10(a), App. 37.

[14] *Id.*, ¶10(c), App. 38.

[15] *Id.*, ¶¶8, 11, App. 36, 38.

[16] App. 3 n.8.

[17] "No challenge has been made to those aspects of the order," as the court below observed. *Id.*

[18] *See* Agreed Statement of Facts ¶9(e), App. 36; ¶28, App. 46.

[19] For example, that court made no reference to the stipulated upgrading of job skills or reduction of commuter tardiness and absenteeism, the encouragement of local involvement in neighborhood projects, or the reduction of the need to rely on explicit racial quotas.

[20] App. 15. *See* note 5 *supra*.

[21] App. 15.

At the same time, the court below expressly acknowledged that "neither on its face, nor in fact, can the order be said to aim solely, or chiefly, at out-of-State residents."[22] As the court explained, the "preference is for inhabitants of the city," and any negative impact "is felt in significant part by other citizens of the Commonwealth, as well as by residents of other States."[23] For this reason the court declined to rule the order violative of the Interstate Privileges and Immunities Clause of Article IV, § 2.[24] The court nonetheless held the order to be a *per se* violation of the Commerce Clause.[25] That court necessarily conceded, in light of this Court's[26] and that court's[27] own precedents, that a city may legitimately prefer its residents in "direct hiring."[28] But the court reasoned that any preference by a city for *firms* that make a good faith effort to fill a majority of their job openings locally would "have a significant impact on those firms which engage in specialized areas of construction and employ permanent work crews composed of out-of-State residents".[29]

Such firms, the court reasoned, "may opt out of bidding on [the City's] projects" rather than changing their mode of operation.[30] But the record contains no indication, nor did

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[22] App. 13.

[23] *Id.*

[24] App. 14.

[25] *Id.*

[26] *E.g.*, *McCarthy* v. *Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976) (per curiam).

[27] *E.g.*, *Milton* v. *Civil Serv. Comm'n*, 365 Mass. 368 (1974).

[28] App. 14.

[29] *Id.*

[30] App. 7. Although the order took effect October 15, 1979, App. 20, and was not struck down until August 28, 1981, App. 1, there was no allegation or finding that it *in fact* had *any* of the consequences feared during that 22-month period. *See also* Part I *infra*, at p. 13 & n.5.

the court below find, that any such impact had been or would be severe or extensive;[31] that it would affect predominantly out-of-state firms or primarily out-of-state workers;[32] or that any out-of-state contractors deterred by the order would not simply be replaced by other out-of-state businesses, thereby yielding no net effect whatever upon the flow of interstate trade and commerce as such.[33]

Meaning of the Decision Below.

The decision below thus precludes all municipal contract and hiring policies under which predominantly non-local crews are to any degree disfavored on city projects.[34] And this holding applies even though such policies do not discriminate between in-state and out-of-state corporations or individuals, do not significantly burden interstate commerce, and have been adopted for legitimate and pressing reasons.

It is not the interstate market itself but hypothetical individual firms located outside the state[35] that have been held by the court below to be beneficiaries of the Commerce Clause. And that clause has, in turn, been construed not as a flexible constraint but as an absolute barrier, invalidating municipal policies without regard to the local interests they are calculated to serve.

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[31] *See* Part I *infra*, at 12 & n.4.

[32] *See* Part I *infra*, at 13 & n.5.

[33] *See* Part I *infra*, at 14 & n.6.

[34] Nothing in the decision turns on any supposed difference between insisting that *all* city contractors satisfy a specified local hiring preference and insisting that *some fraction* of city contractors do so.

[35] Whether *any* out-of-state firms had actually been or would actually be injured by the challenged order is unclear. *See* Part I *infra*, at 12-13 & nn. 4-5.

Finally, the Commerce Clause has been given this meaning by the Supreme Judicial Court not in the context of a state or local tax or regulatory measure intruding upon the private interstate market in some service, commodity, or resource but in the context of a municipality's own choices of whom to hire or with whom to contract.[36] The court below held that "the exception for a State (or one can safely say a municipality) as a market participant" does not "serve[] to protect the . . . order."[37]

Two reasons were advanced in support of this unexpected conclusion. *First*: the order was addressed specifically to "*public works* projects"[38] — that is, to the building, improvement, and repair of the City's public parks, roads, and playgrounds, its public schools and little city halls. And the order involved a publicly funded program with the additional public purposes of preserving for City residents a fair share of the benefits of the "federal, state and city taxes paid by [those] residents,"[39] and of using these public revenues to create jobs and opportunities to combat "high . . . unemployment in the City . . . . particularly . . . [among] residents who have worked or seek work in the construction industry."[40] Understandably, therefore, the court below remarked that some or all of the "activities affected by the executive order" were not "proprietary" in character.[41] They were, indeed, activities of the most traditional governmental sort — activities using public reven-

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[36] *See* Agreed Statement of Facts, ¶18(b), App. 42.

[37] App. 14.

[38] App. 19 (emphasis added).

[39] *Id.* *See also* Agreed Statement of Facts, ¶¶ 7(c), (d), 9(c), (d), App. 35, 36.

[40] App. 19. *See also* Agreed Statement of Facts, ¶¶7 (a), (b), 9(a), (b), App. 35, 36.

[41] App. 15. *See also* p. 21 n.29 *infra*.

ues to provide jobs and construct municipal facilities through public works projects. Curiously, however, the decision below treated this feature of the order not as a basis for *recognizing* or *protecting* the city's "sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal," *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.10 (1980), but as a ground for *diminishing* or *denying* that sovereign interest. The extraordinary result of the judgment in this case is that a city or state may prefer its own residents in the sale of concrete — as in *Reeves* — but not in the local construction of concrete streets and sidewalks.

Second: at the same time, the court fastened upon a seemingly proprietary dimension of the order to hold inapplicable those decisions of this[42] and other courts[43] that have upheld the freedom of local governments to structure their performance of traditionally governmental activities through such mechanisms as preferences for local residents. The court below concluded that a municipality's freedom to adopt such local preferences in its governmental operations is lost when the municipality conducts those operations under contract with private firms instead of relying entirely upon city agencies or bureaus as hiring entities.[44] Use of this device to structure the governmental operation or service in question might, of course, affect the interstate activities of private corporations as employers rather than the interstate activities of private in-

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[42] *See* note 26 *supra*.

[43] *See* note 27 *supra*. *See also, e.g., Ector* v. *City of Torrance*, 10 Cal.3d 129, 514 P.2d 443 (1973) (city librarians may be required to reside in city), *cert. den.*, 415 U.S. 935 (1974); *Abrahams* v. *Civil Service Commission of New Jersey, City of Newark*, 65 N.J. 61, 319 A.2d 483 (1974) (stenographers); *Miller* v. *Krawczyk*, 414 F. Supp. 998 (E.D. Wis. 1976) (civil service employees).

[44] App. 14-15.

dividuals as employees.[45] That prospect, the court held, somehow transforms the city's decision from an exercise of sovereign prerogative in designing governmental operations to a trespass upon the national market entrusted to Congress for uniform regulation.[46] Thus a city may prefer its own residents if it hires them itself — but not if it contracts with others to hire them.

For being both too governmental and not governmental enough, then, the City's order was subjected to the Commerce Clause and then struck down — despite the explicit recognition by the court below that the order might well "have little impact on the structure of the industry or its functioning in interstate commerce."[47] Whether the Commerce Clause invites any such judicial veto over municipal options for coping with inner-city joblessness and urban decay is the central issue posed by this petition.

Reasons for Granting the Writ.

Perhaps the complete reconciliation of Commerce Clause concerns with concerns of state and local autonomy cannot fairly be expected. But this Court's decisions at least make clear that the Commerce Clause empowers no court to strike down a city's program to create public jobs through public works projects simply because some out-of-state firms might opt out of the bidding for city contracts rather than comply with the program's terms. It should at least be clear, in addition, that the Commerce Clause authorizes invalidation of no such program where no discrimination against, or even net

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[45] App. 15.

[46] *Id.*

[47] App. 6.

burden upon, interstate commerce as such is shown, and where pressing, non-protectionist local concerns make the city's choice a plausible means of minimizing absenteeism on municipal projects, maximizing neighborhood participation in such projects, and overcoming past discrimination in ways perceived to be fair to all concerned. And it should be clear, finally, that neither the traditionally governmental character of the city's program and purpose, nor the city's decision to structure its efforts through private intermediaries, may serve to trigger Commerce Clause restrictions that would otherwise be rendered inapplicable by constitutional values of state and local autonomy.

By extending the Commerce Clause into a far more obstructive barrier than this Court has ever countenanced, and by placing that barrier in the path of local choices that this Court has taken care to liberate from even its own more moderate readings of the clause, the court below defied clear constitutional principles. Were the judgment here challenged not to be reviewed and ultimately reversed, the scope and meaning of these once clear principles would be brought into conspicuous question. The writ should therefore be granted and the judgment summarily reversed or the case set for plenary briefing and argument.

Argument.

I. A City's Contract Policies May Not be Struck Down Under the Commerce Clause Solely Because of Their Possible Impact on Particular Out-of-State Firms, Nor May Such Policies be Struck Down Under that Clause without Regard to the Local Interests Served.

It is settled that the Commerce Clause "protects the interstate market, not particular interstate firms," *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127 (1978), and that its

protections require a concrete balancing of "the burden imposed . . . in relation to the . . . local benefits" served, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), not an abstract exercise in absolutes. The court below defied both these principles, creating and applying Commerce Clause doctrine both less systemic and more rigid than any sanctioned by this Court's decisions.

As written, the order struck down below drew no distinction whatever between out-of-state and in-state firms or between out-of-state and in-state employees residing beyond city limits while seeking work on the City's public construction projects. Even as applied, the order was stipulated to have *no effect whatever* on "[t]he *vast majority* of out-of-state contractors," who "generally receive the majority of the members of [their] work crews from the local unions in whose geographical jurisdiction the work is being performed."[1] The *most* that could be said on this record is that the order's effects include "[d]iscouragement of some [in-state] contractors located outside the City . . . and some contractors located outside [the state] from bidding on public construction work" with the City[2] — solely because of what the court below frankly characterized as those contractors' preferred mode of doing business.[3] Neither the evidence, nor the stipulated facts, nor the opinion below, suggest that any such deterrent effect would even be substantial, much less that it would be decisive;[4] that

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[1] Agreed Statement of Facts ¶ 15(a) (emphasis added), App. 41.

[2] *Id.* ¶ 9(j), App. 37.

[3] App. 6-7.

[4] *See* p. 6 n.30 *supra*. Contrast the stipulated fact that the state statute also struck down below but not involved in this petition, *see* p. 3 n.2 *supra*, would effect not simply the "[*d*]*iscouragement*," ¶ 9(j), but the "*preclusion* of some out-of-state employers . . . from obtaining public works construction contracts in the Commonwealth." Agreed Statement of Facts ¶ 13(g), App. 40 (emphasis added).

the order's impact would be felt predominantly by out-of-state individuals or firms;[5] that it would tend to deter entry by any interstate or out-of-state enterprise that would "not promptly be replaced by other interstate" bidders, *Exxon*, 437 U.S. at

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[5] *Cf. South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 187 (1938) ("[T]hat [rules] affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against [political] abuse"); *see also id.* at 184 n.2; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 783 (1945). Indeed, the Agreed Statement of Facts and the Exhibits appended thereto leave little doubt that the order's primary impact would be felt by interests *within the state*.

Between December 1978 and October 1980, some 55.8% of the workers employed on City-funded construction projects resided outside the City but within the state; only 3.8% resided outside the state. App. 48 (Exhibit E to Appendix II to Agreed Statement). The data, which are stipulated to be "representative," App. 44, reveal *no reduction whatever* in percentage of out-of-state residents on City-funded projects after the October 15, 1979, effective date of the order. *See* App. 48.

During December 1978, out of 443 workers employed on City-funded projects, 259 were Massachusetts residents from outside Boston while only 12 were out-of-staters. Of those 12, at most 7 were potentially affected because they were not already working for firms which already employed more Boston residents than out-of-town workers. App. 49-50 (Exhibit F to Appendix II to Agreed Statement).

Viewed from the perspective of potentially affected contracting firms, in December 1978, 59 of the 67 contractors involved in City-funded construction employed exclusively in-state workers. Of the 8 that employed some out-of-state workers, three firms would have been required to make no changes under the order since they already employed at least 50% Boston workers. Two of the remaining five companies were Massachusetts firms; the addresses of the last three are listed on the Exhibit as unknown, App. 50 (Exhibit F), but in fact are Massachusetts corporations — as a matter of public record.

In sum, at most three companies which *might* have been out-of-state firms (but in fact are not) could even potentially have been affected by the order in the only sample month for which a detailed breakdown exists. And, as to those three firms — or, indeed, any others — nothing in the record suggests that *even a single firm* would *in fact* withdraw from the City-funded construction market in Boston rather than undertake the marginal change in staffing that would be required to comply with the order.

127, with the result that there might well be *no net impact* on interstate contract activity;[6] that the order would be likely to affect any individual's choice of where to reside or any firm's choice of where to locate its business;[7] or that the order would in any way distort the free flow of natural resources across state lines.[8]

To attribute a "negative impact on interstate commerce"[9] to the order at issue here is thus to hold, in flat defiance of *Exxon*

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[6] Nothing in the record suggests that, even if some out-of-state firms were to withdraw because of the order, their replacements would not simply be *other out-of-state firms.*

[7] The court below recognized that the local hiring preference would be unlikely to "affect the permanent domicile of employees," App. 15, and nothing in the record indicates that it might affect any contractor's choice of state in which to locate business operations — an even less likely prospect here. Contrast, *e.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Toomer* v. *Witsell*, 334 U.S. 385, 403-04 (1948); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928).

[8] Nothing in this case implicates the Commerce Clause concern with avoiding a state's exploitation of its geographical or resource position "to the disadvantage and displeasure of [its] less strategically situated neighbors." Brown, "The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 228 (1957). Contrast, e.g., *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911) (local hoarding of natural resources might cause national fragmentation where "Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals"). *Accord*, *Hicklin* v. *Orbeck*, 437 U.S. 518, 528-30, 533-34 (1978) (Alaskan oil and natural gas resources); *Hughes* v. *Oklahoma*, 441 U.S. 322, 329-30 (1979) (fish); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) (landfill sites). The job opportunities created by public funds expended by a city on public works construction plainly cannot be equated with natural resources. *See, e.g.*, *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 443-44 (1980) (not even state-manufactured cement counts as a "natural resource" for purposes of such Commerce Clause analysis); *Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371, 385-86 (1978) (state-conserved elk herd not to be equated with natural resources); *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973) (indicating approval of state "policy of preserving state-supported facilities for . . . residents").

[9] App. 15.

and on a far weaker record,[10] that "interstate commerce is . . . subjected to an impermissible burden simply because an otherwise valid regulation" — here, not even a regulation[11] — "causes" — here, *might* cause[12] — "some business to shift from one interstate supplier to another." *Exxon*, 437 U.S. at 127.

Nor need one study the record below to discern the Supreme Judicial Court's treatment of the Commerce Clause as a shield for "particular interstate firms" and for their preferred "methods of operation" rather than for "the interstate market" itself. *Id.* The opinion below reveals on its face that court's understanding that the order it was invalidating might well have "little impact on the structure of the industry or its functioning in interstate commerce."[13] That some out-of-state, along with in-state but out-of-town, employers "may opt out of bidding" on the City's terms, the court unmistakably held, suffices *in itself* to make out a claim under the Commerce Clause.[14] That holding alone warrants summary reversal on the authority of *Exxon*.

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[10] Nothing in this case is comparable to the showing in *Exxon* that the burden in question fell — perhaps designedly — "on the most numerous and effective group of out-of-state competitors, [and that] a similar burden [did] not fall on the class of protected in-state businessmen." 437 U.S. at 148 (Blackmun, J., concurring in part and dissenting in part).

[11] *See* Part II *infra*.

[12] *See* notes 4, 5 *supra*.

[13] App. 6.

[14] App. 7, 14-15. This Court has, of course, held that an otherwise impermissible discrimination against interstate commerce cannot be saved by pointing to the theoretical inclusion of in-state, but non-local, interests in the predominantly out-of-state class burdened by the discrimination. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951). In *Dean Milk*, this Court invalidated on Commerce Clause grounds a city ordinance which required all milk sold in the city to be pasteurized within a five-mile radius — an area including 5,600 dairy farms producing ten times the city's milk needs. Only 500 of those farms actually supplied milk to the City of

But the court below went further. Evidently subjecting the order at issue to the strictest form of overbreadth scrutiny, it condemned that order as insufficiently "targeted to the legitimate interests which the city has asserted," [15] offering only the illustration that, insofar as the City sought to reduce local unemployment, its action "swe[pt] far wider than merely favoring unemployed or underemployed residents." [16] The court then cited this Court's plainly inapposite ruling in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), invalidating under Article IV § 2 Alaska's

> attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents.[17]

Even if Commerce Clause claims of the sort made here could properly be deemed to trigger scrutiny as strict as that used to review facial discriminations against non-residents in private employment,[18] the connection between (1) persistently

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Madison. Given the large surplus already present and the consequent improbability that any Wisconsin concern outside the five-mile radius would seek to enter the Madison market, the ordinance effectively served to bar only Dean Milk Co., a large Illinois firm. "In thus erecting an economic barrier protecting a major local industry from competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* at 354.

[15] App. 15.

[16] *Id.*

[17] *Id.* at 531. *See also id.* at 530.

[18] No case in this Court remotely supports such severe scrutiny of facially neutral provisions shown to have neither a protectionist aim nor a protectionist effect. *Contrast Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142, with *Toomer* v. *Witsell*, *supra*.

high inner-city joblessness — including "a particularly high rate of unemployment and underemployment for [such] residents who have worked or seek work in the construction industry" [19] — and (2) the opportunities for inner-city construction work and training created by the instant order, is so much closer than that involved in *Hicklin* as to make the comparison wholly inapt.

In any event, any arguable looseness of fit between the order and *one* of its several goals establishes nothing about how reasonably the order fits the *mix* of objectives it is designed to serve. *Cf. Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 116 (1949) (Jackson, J., concurring). Some of the most tangible of the order's objectives — such as the reduction of absenteeism and tardiness by commuting construction workers [20] — are not only among the order's stipulated effects [21] but would obviously be difficult to achieve through any municipal policy that *failed* to give hiring preference to resident workers, since the problems identified are ones of which nonresidents are a peculiar source. *Cf. Hicklin*, 437 U.S. at 526. Other, less tangible objectives — such as increasing local participation in and commitment to city projects; [22] reducing the need for ethnic or racial quotas by relying on the correlation between such factors and residency itself; [23] alleviating racial tensions arising out of a perceived favoritism for minorities in past affirmative action efforts by the City [24] — likewise invoke links among local control, local participation, and local success that this Court has itself recog-

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[19] Preamble to Order, App. 19.

[20] *See* Agreed Statement of Facts ¶ 9(f), App. 36.

[21] *Id.*

[22] *Id.*, ¶¶ 10(a), (c), App. 37, 38.

[23] *Id.*, ¶ 9(e), App. 36.

[24] *Id.*, ¶¶ 8, 11, App. 36, 38.

nized as both legitimate and significant. *See, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 41, 49-50 (1973); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 469 (1972); *id.* at 478 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting).

Especially when taken together, these aims and purposes amply justify the City's policy — assuming independent justification is in fact needed.[25] That there may be "alternative ways of solving" the urban problems confronted here, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959), cannot be gainsaid. But that possibility creates no basis for a court either to second-guess the balance among incommensurables that the City chose to strike, *cf. Brotherhood of Locomotive Firemen & Engineermen* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 140 (1968), or to disregard altogether — as the court below did — many of the interests indisputably served by the action here challenged. *See Minnesota* v. *Clover Leaf Creamery Co.*, 101 S.Ct. 715, 727-29 (1981); *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142.

Particularly as local governments increasingly confront what some have called "zero-sum" situations[26] — where every group's gain is, to some degree, another's loss — any court that uses the Commerce Clause to veto plainly non-protectionist political solutions without regard to the "special difficulties [such local solutions] seek to adjust," F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 33-34 (1937), deploys the Constitution as a far deadlier device than the Framers, always solicitous of state and local needs for flexibility, could possibly have intended.

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[25] A closely parallel set of justifications was deemed sufficient to support residency requirements for city librarians and for county civil service employees in the *Ector* and *Miller* cases cited on p. 9 *supra*, n.43.

[26] L. THUROW, THE ZERO-SUM SOCIETY (1980).

II. A City Does Not Lose its Commerce Clause Immunity as a Market Participant Because of the Traditionally Governmental Nature of the Activities Involved, or its Tenth Amendment Immunity in Structuring Such Activities Because of its Reliance on Private Contractors to Carry Them Out.

At least as egregious as the court's treatment of the Commerce Clause as a sinecure for specific firms rather than a safeguard for the interstate system, and as an absolute restraint rather than a flexible limit capable of accommodating legitimate local concerns,[27] is the invocation of that clause *at all* to scrutinize municipal contracting and hiring policy in the provision of jobs through publicly financed public works construction.

In *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), this Court held the constraints of the Commerce Clause wholly inapplicable to a state's "marketplace conduct," finding in the clause "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market," *id.* at 437, and recognizing that state and local governments "may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." *Id.* at 438 n.10. To be sure, the four Justices who dissented in *Reeves* would have limited such Commerce Clause immunity to cases in which a state or municipality undertakes "integral government operations in an area of traditional governmental functions." *Id.* at 451 (Powell, J., joined by Brennan, White, and Stevens, JJ., dissenting). As to *such* "marketplace actions," *id.* at 438 n.10 (majority opinion), however, the Court was *unanimous* in finding immunity.

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[27] See Part I *supra*.

Thus, whatever the ultimate resolution of the disagreement in *Reeves* with respect to state or local activities undertaken for enterpreneurial purposes, financed not by "general tax funds" but "by the revenues [they] generate[ ]," *id.* at 452 n.3 (dissenting opinion), or otherwise resembling the actions of a "private firm," *id.* at 451, it surely cannot be said that Commerce Clause immunity vanishes or recedes where, as here, the affected activities — including the building at public expense[28] of public schools, parks, and streets — must be deemed

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[28] The order's stipulated aims and effects include "[e]nsuring that Boston residents receive some direct benefit from public works projects funded in part by federal, state and city taxes paid by Boston residents." Paragraphs 7(d), 9(d), of Agreed Statement of Facts, App. 35, 36. The court below, stressing the undisputed fact that "a significant percentage of the funds affected by the order are received from Federal sources," inexplicably reached the conclusion that the City's interest in retaining for its residents a fair share of the benefits generated by the City's expenditure of such funds was thereby so diminished as to render "the *Reeves* decision . . . [in]applicable." App. 15. That conclusion is untenable for at least three reasons.

First, the City's interest in conserving for its residents a substantial part of the benefits generated by a City-administered program funded with "taxes paid by [the City's] residents," ¶¶ 7(d), 9(d), is manifestly independent of whether such taxes are paid entirely to, and thus channeled wholly through, the City's revenue authorities — or are paid partly to, and thus channeled partly through, the revenue authorities of the State and Federal Governments as well.

Second, as this Court held in *Pennhurst State School & Hospital* v. *Halderman*, 101 S.Ct. 1531, 1540 (1981), "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (Footnote omitted.) In the present case, of course, *no* relevant condition — ambiguous or otherwise — has been identified as a bar to the City's proposed local hiring preference in the administration of the federal funds in question. And, were such a condition identified, it would then have to be scrutinized in terms of this Court's reminder in *Pennhurst* that "[t]here are limits on the power of Congress to impose [such] conditions." *Id.* at 1540 n.13 (citing, *inter alia*, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)).

Third, the very sources of federal funding to which respondents point in their complaint in this case — *see* Complaint ¶ 37 (Dept. of Housing and Urban Development, Urban Development Action Grants and Community

more "governmental" than "proprietary."[29] On the contrary, immunity in cases of this sort follows *a fortiori* from *Reeves*. In holding *Reeves* immunity inapplicable to such public works activity, therefore, the court below impermissibly turned both the Commerce Clause and core concepts of state and local sovereignty inside-out. *See National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976); *id.* at 847 (identifying injury to municipal affirmative action efforts as illustrative of intrusion on local sovereignty). *Cf. Metromedia, Inc.* v. *San Diego*, 101 S. Ct. 2882, 2895-96 (1981) (invalidating local ordinance as impermissibly inverting this Court's treatment of noncommercial speech as entitled to greater protection than commercial speech).

Development Block Grants) (accounting for some $34 million of the $54 million in City-funded construction at issue here, according to ¶ 18(b) of Agreed Statement of Facts, App. 42); Complaint ¶ 38 (Dept. of Commerce, Economic Development Administration Regulation) — appear plainly to support, rather than undermine, the City's employment preference for local residents. *See, e.g.*, Dept. of Commerce Regs., 13 C.F.R. § 305.54(a) ("maximum feasible employment of local labor shall be made in the construction of public works and development facility projects receiving direct grants and loans," and "every contractor and subcontractor . . . shall be required to employ . . . qualified persons who regularly reside in the . . . area where [the relevant] project is to be located"); Dept. of Housing and Urban Development Regs., 24 C.F.R. § 570.307(m) ("to the greatest extent feasible opportunities for training and employment [should] be given to lower-income residents of the project area").

In such circumstances, it is difficult to comprehend the statement by the court below that "the presence . . . of substantial funds from nonlocal sources is . . . an important factor in determining whether . . . *Reeves* . . . is applicable." App. 15. This misapplication of *Reeves* and the failure to apply *Pennhurst* independently support plenary review of the decision below.

[29] *See generally* American Public Works Association, History of Public Works in the United States, 1776-1976 (E. Armstrong, ed. 1976); J. Isakoff, The Public Works Administration (1938); C. Ridley, The Public Works Department in American Cities 7 (1926); Selden Society, Public Works in Medieval Law, Vol. I (Introduction, P. xxii) (1915); Vol. II (Introduction, P. lvi) (1923).

Some public subsidy programs, one may concede, might deploy "state money both as a carrot and as a stick," *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 796 (1976), in such a way as to hoard resources (*see* note 8 *supra*) or impose otherwise unacceptable trade barriers in an essentially regulatory interference with the national market. This Court pointedly suggested in *Reeves*, 447 U.S. at 440 n.14, that Commerce Clause restrictions might, in that event, become applicable. And three Justices indeed regarded Maryland's war on abandoned automobiles to have precisely that suspect character despite this Court's contrary ruling in *Alexandria Scrap*, 426 U.S. at 817-29 (Brennan, J., joined by White and Marshall, JJ., dissenting).

But it is a radical misinterpretation of this possible limitation upon *Reeves* and *Alexandria Scrap* to treat Commerce Clause constraints as triggered by the very fact that a local government's challenged actions *as buyer or as supplier* are taken in a traditionally governmental context. To avoid this flagrant distortion of its precedents, the Court should review and ultimately reverse the judgment below.

The need for such review is heightened by the lower court's further holding that, insofar as a city's preference for employing local residents in its governmental dealings might otherwise be immunized from federal restraints,[30] that preference loses such protection the moment it is implemented not through "direct hiring" by public agencies, but through indirect hiring under contracts with private firms serving as proprietary intermediaries.[31] No doubt such reliance on private contractors and sub-contractors might, as the court below said, affect the "interstate activities of construction firms" as opposed to the interstate choices of "domicile of employees."[32]

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[30] *See* p. 6, *supra*, nn.26, 27.

[31] App. 14.

[32] App. 15.

But that possible distinction makes absolutely no difference to the applicability of the Commerce Clause, which protects the interstate mobility of labor no less than that of capital — of people no less than of corporations. *See, e.g., Edwards* v. *California*, 314 U.S. 160 (1941) (Commerce Clause precludes state ban on immigration of indigent persons).

At the same time, to hold that the Commerce Clause leaves states and cities free, under such decisions as *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (*per curiam*) (upholding city requirement that all municipal employees reside in city), to prefer local employees in traditionally governmental activities *only if the workers involved are hired directly by government* not only rejects the premises of this Court's holdings in *Reeves* and in *American Yearbook Co.* v. *Askew*, 409 U.S. 904 (1972), summarily aff'g 339 F. Supp. 719 (M.D. Fla. 1972) (state may choose to obtain all needed printing services from in-state shops), but also intrudes without apparent justification into the "ability [of states and cities] to structure relations . . . with [their] own citizens" in "fashioning . . . effective and creative programs for solving local problems and distributing government largesse." *Reeves*, 447 U.S. at 438 n.10. "It follows easily that the intrinsic limits of the Commerce Clause," *id.*, ought to leave this state and local capacity wholly intact. *Cf. National League of Cities*, 426 U.S. at 848 (interest in local sovereignty includes freedom to hire on "casual" basis rather than relying on permanent city employees).

For all practical purposes, the court below has proclaimed public jobs programs and public works projects too "governmental" to enjoy the immunity conferred by *Reeves* in the more problematic context of proprietary action — and has at the same time pronounced the protection such programs and projects receive precisely *because* of their governmental nature to be inapplicable whenever those programs employ proprietary

structures. Whether or not a literal "Catch-22" results, it seems plain that no such judicial intrusion into state and local governance may be defended as an interpretation of the Commerce Clause.

Conclusion.

Even accepting as axiomatic the proposition that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division," *Baldwin* v. *Seelig*, 294 U.S. 511, 523 (1935), the health of the national body politic nonetheless presupposes the capacity of its several organs, state and local, to maintain their vitality by coping with local needs and localized malfunctions — arranging their integral operations in ways both sensitive to local problems and consistent with the structural integrity of the system as a whole. Invoked to veto such arrangements simply because of their potential burdens upon one or more external interests, the Commerce Clause would become a source of national weakness rather than strength. To make clear that its decisions require no such result, this Court should grant certiorari to review the decision below.

Respectfully submitted,

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November 25, 1981.

Appendix

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INCORPORATED & others[1] *vs.* MAYOR OF BOSTON & others.[2]

Suffolk. May 6, 1981. — August 28, 1981.

Present: HENNESSEY, C.J., WILKINS, ABRAMS, NOLAN, & LYNCH, JJ.

Constitutional Law, Privileges and immunities, Commerce clause, Federal preemption. *Labor*, National Labor Relations Act.

Neither the provisions of G. L. c. 149, § 26, giving preference to residents of the Commonwealth for positions in State-funded construction projects, nor an executive order of the mayor of Boston requiring that 50% of the positions on city-funded construction projects be filled with Boston residents constituted an interference in labor negotiations in violation of the National Labor Relations Act. [ ]

General Laws c. 149, § 26, which mandates that private contractors on State-funded construction projects give preference to residents of the Commonwealth in hiring for certain positions, violates the privileges and immunities clause of the United States Constitution. [ ]

An executive order of the mayor of Boston requiring that 50% of the positions on city-funded construction projects be filled with Boston residents violates the commerce clause of the United States Constitution. [ ]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on March 20, 1980.

The case was reported by *Liacos*, J.

Paul J. Kingston for the plaintiffs.

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[1] The other plaintiffs are the Massachusetts State Building and Construction Trades Council, AFL-CIO; the Building and Construction Trades Council of the Metropolitan District, AFL-CIO; individual contractors incorporated in Massachusetts; contractors incorporated in Rhode Island; and members of sixteen trade unions.

[2] The city of Boston, the Boston Redevelopment Authority, the Economic Development and Industrial Corporation, and the Massachusetts Department of Labor and Industries. The Boston Jobs Coalition, Inc., was allowed to intervene as a defendant.

Gerard J. Clark for the Mayor of Boston & others.

E. Michael Sloman, Assistant Attorney General (*Carl Valvo*, Assistant Attorney General, with him) for Massachusetts Department of Labor & Industries.

Kurt M. Pressman for Boston Jobs Coalition, Inc., intervener.

Wayne S. Henderson, for New England Legal Foundation, amicus curiae, submitted a brief.

LYNCH, J. Before us is a challenge to a portion of G. L. c. 149, § 26,[3] and to an executive order[4] of the mayor of the

[3] General Laws c. 149, § 26, as amended through St. 1967, c. 296, §§ 2, 3, reads in pertinent part: "In the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the commonwealth, or by a county, town or district, or by persons contracting or subcontracting for such works, preference shall first be given to citizens of the commonwealth who have been residents of the commonwealth for at least six months at the commencement of their employment who are male veterans as defined in clause Forty-third of section seven of chapter four, and who are qualified to perform the work to which the employment relates; and secondly, to citizens of the commonwealth generally who have been residents of the commonwealth for at least six months at the commencement of their employment, and if they cannot be obtained in sufficient numbers, then to citizens of the United States, and every contract for such work shall contain a provision to this effect. Each county, town or district in the construction of public works, or persons contracting or sub-contracting for such works, shall give preference to veterans and citizens who are residents of such county, town or district."

[4] The relevant portion of the mayor's order is as follows:

"(1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

"a. at least 50% by bona fide Boston residents;

"b. at least 25% by minorities;

"c. at least 10% by women.

"For purposes of this paragraph worker hours shall include work performed by persons filling apprenticeship and on-the-job training positions.

"(2) Each department of the City of Boston contracting with any private corporation or person for such construction projects, shall include in all such contracts the provisions of the City of Boston Supplemental

city of Boston, as well as to a regulation of the Boston Redevelopment Authority (BRA).[5] The contested section of the statute mandates that private contractors on State-funded construction projects give preference to residents of the Commonwealth in hiring for certain positions.[6] Disputed in the mayoral order is the requirement that private contractors fill fifty per cent of the positions on city-funded[7] construction projects with Boston residents.[8] Originally the action came before a single justice of this court on a com-

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Minority Participation and Residents Preference Section to insure compliance with this Executive Order.

"(3) The Equal Employment Opportunity Contract Compliance Office of the City of Boston through the awarding Authority shall be responsible for monitoring and enforcing the provisions of this Executive Order and the contract provisions established in accordance therewith."

[5] Section 8 of the Rules and Regulations of the Boston Redevelopment Authority Governing Chapter 121A Projects in the City of Boston reads as follows: "The applicant shall state that the 121A entity or any contractor working for the 121A entity will, to the best of its ability grant preference in hiring to Boston residents during the construction period and during the period of management of the Project. To the extent possible employers under contract to (including subcontractors), or leasing from, the 121A entity will be required to list all job openings with the City of Boston CETA office, ten (10) working days in advance of any public advertisement of the positions. Any employer under 121A, who utilizes the State Division of Employment Security to find job applicants, will be required to specify in this request a preference for City of Boston residents. This requirement shall be consistent with all applicable collective bargaining requirements."

[6] There is no challenge to the durational aspect of the residency preference, although the question of the validity of such statutory requirements has been raised in a number of contexts. Compare *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974), and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), with *Sosna* v. *Iowa*, 419 U.S. 393 (1975), and *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), aff'd, 401 U.S. 985 (1971).

[7] The funds involved include significant sums applied by the Commonwealth and the Federal government.

[8] No challenge has been made to those aspects of the order setting out hiring guidelines based on race and sex. Such provisions in other cities have been the subject of litigation. See, e.g., *Local Union No. 35, IBEW* v. *Hartford*, 625 F.2d 416 (2d Cir. 1980), cert. denied, U.S. (1981) (49 U.S.L.W. 3969 [June 29, 1981]).

plaint for injunctive and declaratory relief. The single justice reserved and reported ten questions to the full court.[9]

[9]The following questions were reported by the single justice:

"1. Is the application of G. L. c. 149, § 26, to construction projects involving Federal assistance invalid because it is in conflict with the Federal statutes (and rules and regulations derived therefrom) authorizing such assistance and/or is such application of the statute invalid under the Supremacy Clause of the United States Constitution?

"2. Does G. L. c. 149, § 26, conflict with the privileges and immunities clause, the due process clause, the equal protection clause, the contract clause and the commerce clause of the United States Constitution, and does it conflict with Articles I, X, and XII of the Massachusetts Constitution?

"3. Does G. L. c. 149, § 26, conflict with the obligations of the plaintiffs under the National Labor Relations Act, and is it therefore invalid under the Supremacy Clause of the United States Constitution?

"4. Is the application of the residency aspects of Executive Order to construction projects involving Federal assistance invalid because in conflict with the federal statutes (and rules and regulations derived therefrom) authorizing such assistance and/or is such application of the Executive Order invalid under the Supremacy Clause of the United States Constitution?

"5. Does the Executive Order, by establishing a residents' preference, conflict with the privileges and immunities clause, the due process clause, the equal protection clause, the contract clause and the commerce clause of the United States Constitution, and does it conflict with Article I, Article [X] and Article XII of the Massachusetts Constitution?

"6. Do the residency aspects of Executive Order conflict with the obligation of the plaintiffs under the National Labor Relations Act, and is it therefore invalid under the Supremacy Clause of the United States Constitution?

"7. Are the residency aspects of Executive Order invalid under Section 6 or Section 7(5) of Article 89 of the amendments to the Constitution of Massachusetts, and/or G. L. c. 43B, § 13 (the Home Rule Procedures Act)?

"8. Does the BRA violate the provisions of G. L. c. 121A by conditioning approval of application for tax status under that Chapter upon an applicant's acceptance of Section 8 of the BRA's 'Rules and Regulations Governing Chapter 121A Projects in the City of Boston'?

"9. Are the residency aspects of the Executive Order invalid as beyond the inherent power of the Mayor under the City Charter?

"10. Is the conditioning of a developer's application for a UDAG [Urban Development Action Grant] upon his agreement to abide by the residency aspects of the Executive Order in conflict with 42 U.S.C. sec. 5301 *et seq.* and/or is such conditioning invalid under the Supremacy Clause of the U.S. Constitution?"

A number of issues are raised. Both the statute and the executive order are challenged in their entirety as an interference in labor negotiations in violation of the National Labor Relations Act (NLRA), and thereby in conflict with the supremacy clause of the United States Constitution, art. VI, cl. 2. Both are also said to be invalid because of the Federal constitutional protections contained in the privileges and immunities (art. IV, § 2, cl. 1), due process, contract, and commerce clauses. Analogous provisions in the Constitution of the Commonwealth are also invoked by the plaintiffs, chiefly arts. 1, 10, and 12. The executive order alone is claimed to be an improper exercise of power under the "home rule" provisions of art. 2, as amended by art. 89, of the Amendments to the Massachusetts Constitution, and as beyond the inherent power of the mayor under the city charter. So too the actions of the BRA are claimed to exceed the authority granted by G. L. c. 121A. Finally both G. L. c. 149, § 26, and the executive order are challenged in part as they apply to Federal funds. The plaintiffs contend that the Federal statutory and regulatory frameworks for the distribution of these funds forbid the imposition of residency provisions.

We must first consider those statutory arguments which would invalidate the challenged provisions. It is only if the statute and order survive this scrutiny that we need consider constitutional issues. Compare *School Comm. of Springfield* v. *Board of Educ.*, 366 Mass. 315, 388 (1974) (Quirico, J., concurring), cert. denied, 421 U.S. 947 (1975), with *id.* at 339-350 (Tauro, C.J., addendum). In the questions before us, only affirmative answers to the questions concerning preemption under the NLRA (questions 3 and 6) would fully resolve the plaintiffs' claims without reaching a constitutional issue. Since we find for the defendants on that issue, we turn to the privileges and immunities clause of art. IV, § 2,[10] and

[10] Article IV, § 2, cl. 1, of the United States Constitution reads as follows: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

the commerce clause[11] of the United States Constitution, which dictate a decision in the plaintiffs' favor.[12] Finally, we decline to answer question 8, which concerns the residents preference instituted by the BRA, both because we believe the agency may wish to reconsider its regulation in light of this opinion and because the issue has not been adequately argued before this court.

I. The Character of The Residents Preferences.

General Laws c. 149, § 26, provides an absolute preference for residents[13] of the Commonwealth in the positions described. There seems little dispute that a qualified resident of the Commonwealth, if available, must be hired for any job covered by § 26. Although the statute also contains a local preference, the Massachusetts Department of Labor and Industries has chosen not to enforce that provision because of concerns about its constitutionality.[14] The order of the mayor is somewhat broader in its application to all "worker hours on a craft-by-craft basis," but rather than imposing an absolute preference it mandates that fifty per cent of those hours must be contributed by workers who are residents of the city.

To the extent that all workers are hired anew by contractors for every project, these provisions may have little impact on the structure of the industry or its functioning in interstate commerce. In differing degrees many subcontractors do hire for each project. Frequently, however, a

[11] Article I, § 8, cl. 3, of the United States Constitution, the commerce clause, reads: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[12] Conceivably, questions concerning the mayoral order could be disposed of on other grounds, but the resolution we reach is intimately related to the questions necessarily discussed in considering G. L. c. 149, § 26.

[13] For purposes of analysis under the privileges and immunities clause, "residents" and "State citizens" are essentially interchangeable terms. See *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 n.8 (1978).

[14] There are a number of other provisions contained in the challenged statute. We consider them to be separable from the residents preference portion of G. L. c. 149, § 26.

contractor will have a regular work crew, particularly in certain specialized fields. If some members of a crew are not residents of the Commonwealth or of the city, it will be necessary that they be replaced or, alternatively, their employer may opt out of bidding on these projects. The defendants acknowledge that both results do occur.

The goals of both G. L. c. 149, § 26, and the executive order are to lessen unemployment in the Commonwealth or in the city and to ensure that the expenditure of local funds results in maximum benefits to the locality where the monies are raised. As an additional reason for the mayor's order the city describes a desire to ensure adequate representation of city residents in construction union jobs and a lessening of racial tensions.[15]

II. Preemption And The National Labor Relations Act.

The plaintiffs suggest that the policy of the National Labor Relations Act (29 U.S.C. §§ 151 et seq. [1976]) preempts the residents preference contained in both the statute and executive order. In effect G. L. c. 149, § 26, and the order are claimed to be invalid as attempts to override or control substantive terms in agreements between unions and contractors. Neither the Commonwealth nor any of its subdivisions may act in a manner that frustrates Federal labor policy. States are forbidden to penalize practices which Congress and the National Labor Relations Board (NLRB) deem to be legitimate economic weapons. *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (State may not penalize union refusal to work overtime when such refusal was allowed under the NLRA); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (State may not penalize picketing arguably protected under the NLRA even though the NLRB

[15]The city states that if this action came to trial, evidence would be presented to demonstrate that some members of Boston's nonminority population resented attempts to ensure certain minimal levels of minority and female employment on construction projects. The fifty per cent quota was thus established in part to ensure that all segments of the city's population received some of the jobs, thereby alleviating any hostility.

declines jurisdiction), nor may State law be used to dictate the outcome in an area of mandatory bargaining, *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959) (State antitrust laws may not be used to invalidate an agreement meant to protect negotiated wage scale).

Here, however, it is difficult to imagine how the Commonwealth or the city is intruding into the negotiating process between contractors and unions. In essence, the plaintiffs argue that the Commonwealth may do nothing that influences any possible condition of a labor contract. This is far too broad a reading of preemption under the NLRA. See *Amalgamated Transit Union, Div. 819* v. *Byrne*, 568 F.2d 1025 (3d Cir. 1977) (en banc) (State did not violate NLRA by threatening to withdraw subsidies to private transportation companies which included unlimited cost of living increase provisions in their collective bargaining agreements). Additionally, in this particular instance, it is curious to contend that the negotiating process has been skewed in favor of either party when both unions and contractors are before this court opposing the residents preference. We therefore answer both parts of questions 3 and 6 in the negative.

III. The Constitutional Provisions At Issue.

The privileges and immunities and commerce clauses act together to provide a free flow of individuals and business activities among the States. The former "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy," *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948), while the latter serves as an embodiment of the assumption implicit in the Constitution that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (Cardozo, J.).

Thus, while States are not prevented from favoring their citizens in certain circumstances, *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980) (State may favor its own citizens in selling cement from State-owned plant during shortage); *Baldwin*

v. *Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978) (States may charge non-residents substantially higher fees for recreational hunting licenses), there are definite limitations on the methods that may be used, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978), and cases cited.

IV. The Statute.

Determining whether G. L. c. 149, § 26, violates the privileges and immunities clause requires a two-step analysis. First, is the right at stake "fundamental"? See *Baldwin* v. *Fish & Game Comm'n of Mont.*, 436 U.S. 371, 387 (1978). Compare *Ostrager* v. *State Bd. of Control*, 99 Cal. App. 3d 1, 5 (1979) (participation in State compensation program for victims of crime not fundamental), with *State* v. *Nolfi*, 141 N.J. Super. 528, 537-538 (1976) (out-of-State resident must be allowed to participate in pretrial diversion program for criminal defendants). Second, if the right is found to be fundamental, the discrimination challenged may be justified if there is a showing that nonresidents are a "peculiar source" of an "evil" that the Legislature is seeking to remedy, *Hicklin* v. *Orbeck*, 437 U.S. 518, 525 (1978), quoting from *Toomer* v. *Witsell*, *supra* at 398, or that there is a valid justification for the distinction other than the mere fact of nonresidency, *Hicklin*, *supra*. See, e.g., *Rubin* v. *Glaser*, 83 N.J. 299, 305-306 (1980) (State may treat residents and nonresidents differently for some tax purposes, if such treatment bears a close relation to extra taxes paid by residents in other contexts). Accord, *Lung* v. *O'Chesky*, N.M. , (1980).[a]

A. *Fundamentality.*

Initially the defendants contend that the employment at issue involves no fundamental interest and so the privileges and immunities clause is inapplicable. A certain surface plausibility is lent to this theory because the term "fundamental" has been used to describe several very different concepts in constitutional analysis. *Carchman* v. *Korman Corp.*, 456 F. Supp. 730, 738 & n.9 (E.D. Pa. 1978). Note,

[a] 617 P.2d 1317, 1320 (N.M. 1980).

Of Interests Fundamental and Compelling: The Emerging Constitutional Balance, 57 B.U. L. Rev. 462 (1977). Our attention is directed to cases that hold certain rights fundamental for purposes of the equal protection clause of the Fourteenth Amendment to the United States Constitution, rights which, therefore, can be restricted only upon the showing of a compelling State interest. See, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to interstate travel); L. Tribe, American Constitutional Law § 16-10 (1978) (discussing fundamental nature of equal access to the ballot). Admittedly, employment opportunities, whether public or private, have not been given this extraordinarily high level of protection.

For purposes of art. IV, § 2, however, from the earliest incorporation of the notion of "fundamentality," the clause has been thought to protect the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise," *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (Washington, Circuit Justice). This position has been consistently followed. See *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973); *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870). Indeed, reconciling the holding in *Baldwin*, *supra*, which allowed a substantially higher licensing fee to be charged to out-of-State hunters, with the holding in *Toomer* v. *Witsell*, *supra*, which negated a substantial differential in license fees for commercial shrimp fishing, is possible because the Court in *Baldwin*, *supra*, recognized a constitutional difference between recreational activity and the pursuit of a livelihood.[16] See Note, The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights, 33 U. Miami L. Rev. 691, 693 (1979). Limiting a

[16] The degree to which "learned professions" may present a different situation is not now before us and we express no opinion on that point except to note that the issue is one on which there is substantial debate. See generally Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv. L. Rev. 1461 (1979).

particular kind of work opportunity because of a person's place of residence does impinge upon a "fundamental" right and thus satisfies the first element of a privileges and immunities analysis.

B. *Possible Sources of Justification for the Discrimination.* *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), is controlling on this issue because it establishes a clear rule that a State may not use its control over a resource to create an absolute employment preference for its own residents. There, Alaska had attempted to utilize its control over oil leases on State-owned land to require that Alaska residents be given absolute preference in hiring not only in the oil fields, but also in any activity that benefited from the ripple effect of the energy boom. *Id.* at 531. The Supreme Court rejected Alaska's claim that ownership of the land in question gave the same authority that any owner might have to place conditions on the lease or sale of a resource. *Id.* at 528. A significant factor in the Court's holding was that no evidence was presented that nonresidents were a particular source of Alaskan unemployment. *Id.* at 526. Additionally, the statute was suspect because it swept more broadly than necessary to achieve the goal of increased training and employment of Alaska residents, an end better served by a preference aimed at the unemployed or those in training programs.[17] *Id.* at 527-528. Since *Hicklin* forbids the use of State control over a resource to force an absolute preference

[17] It is not totally clear how closely a statute must match means and ends once a substantial State interest in discriminatory treatment has been identified. *Austin* v. *New Hampshire*, 420 U.S. 656, 663 (1975), in analyzing art. IV, cl. 1, as applied to tax matters, describes "a standard of review substantially more rigorous" than that usually applied to State tax distinctions. This has been compared to the intermediate scrutiny apparently applied in cases dealing with illegitimacy and alienage. See Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv. L. Rev. 1461, 1479 (1979); Note, The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights, 33 U. Miami L. Rev. 691, 698-699 (1979). We need not determine the exact standard of review required since we believe *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), is controlling on these facts.

in hiring by a private contractor, the residents preference provisions of G. L. c. 149, § 26, must fall.

The defendants would distinguish *Hicklin* on two bases. First, that the regulation at issue merely protects the use of a limited resource (jobs), restricting them to State residents and second, by analogy to certain commerce clauses, that as a market participant it may act unfettered by the restrictions of the privileges and immunities clause. See *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

1. *Limited resources.* There may be a suggestion in older cases that when a State-controlled resource is limited, a preference can be given to residents. See *Toomer* v. *Witsell, supra* at 397-398. But there must be some evidence that the services or resources, assuming they involve fundamental rights, are overburdened. *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973). The defendants point to a high level of State-wide unemployment. *Hicklin, supra*, however, clearly rejects such an argument without a clear demonstration that out-of-State residents are a peculiar source of high unemployment. *Id.* at 526. Such a showing is not made on the record before us.

2. *Acting as a market participant.* The defendants' second contention is that a residents preference in hiring for construction financed by public funds is substantially different from a preference based on the fortuitous location of a natural resource within a State's borders. The Commonwealth would thus turn to *Hughes, supra*, and *Reeves, supra*, in determining the extent to which the State, acting as a purchaser of goods and services, is exempt from the restrictions of the privileges and immunities clause.[18]

[18] Neither party discussed to any substantial degree several older decisions upholding G. L. c. 149, § 26, and similar statutes against challenges based on the exclusion of aliens from public construction employment. See *Lee* v. *Lynn*, 223 Mass. 109 (1916) (upholding G. L. c. 149, § 26, against a challenge from Massachusetts residents with foreign citizenship); *Crane* v. *New York*, 239 U.S. 195 (1915); *Helm* v. *McCall*, 239 U.S. 175 (1915). The holdings of these cases are at best questionable

The Commonwealth is correct that the commerce clause does not prevent a State from preferring resident business in purchasing goods, see *Hughes, supra* at 810, or services, *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719, 723 (M.D. Fla.) (three judge court), aff'd mem., 409 U.S. 904 (1972), or in the distribution of State-produced materials in a shortage situation, *Reeves, Inc.* v. *Stake, supra* at 446-447. One major weakness in such an analogy is that in none of the cases cited was the use of the State's market power extended beyond granting an initial contract or a first sale. The commerce clause cases suggest that Alaska might quite properly have preferred its own residents in granting initial leases on its oil land, but *Hicklin, supra*, leaves no question that the extension of this power to favor absolutely all State residents in employment was unacceptable. Therefore, the statute before us cannot stand. See *Salla* v. *County of Monroe*, 48 N.Y.2d 514 (1979) (overturning on privileges and immunities grounds a New York statute nearly identical to G. L. c. 149, § 26, as enforced). We thus respond "yes" to the first issue raised in question 2. We need not consider the additional issues raised therein, nor need we answer question 1.

V. The Executive Order.

A. *Privileges and Immunities.*

The invalidity of the residents preference contained in the statute does not necessarily dictate a similar result with regard to the mayoral order. The plaintiffs contend that the same privileges and immunities analysis should be applied, but neither on its face, nor in fact, can the order be said to aim solely, or chiefly, at out-of-State residents. The preference is for inhabitants of the city, and its "negative" effect is felt in significant part by other citizens of the Commonwealth, as well as by residents of other States. In such

in light of more recent decisions dealing with constitutional protections for aliens. See generally Note, A Dual Standard for State Discrimination Against Aliens, 92 Harv. L. Rev. 1516 (1979). In any case, *Hicklin, supra* at 531 n.15, indicates that *Helm* and *Crane* have no weight as precedents in construing art. IV, § 2, of the United States Constitution.

The municipal hiring cases are quite different since they affect the permanent domicile of employees rather than discouraging the interstate activities of construction firms. Second, the record indicates that a significant percentage of the funds affected by the order are received from Federal sources. Thus, it is inaccurate to describe the preference as a mere use of city-raised funds to further local interest. The analysis in *Reeves, supra*, which the city cites in defense of the executive order, is distinguishable on this ground. There, the concrete plant operated by South Dakota was an example of State-raised revenues being expended with a genuine risk of failure, the cost of which would have been borne by the State. The Court of Appeals of New York in *Salla, supra* at 524-525, found this element nearly definitive in justifying the invalidation of New York's residents preference in the awarding of public construction contracts. We do not go so far, but the presence or absence of substantial funds from nonlocal sources is at the very least an important factor in determining whether the *Reeves* decision is applicable.

Finally, as in *Hicklin, supra*, there is a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents. Although *Reeves, supra*, does indicate that a sympathetic reading under the commerce clause should be given to State or local action in a proprietary capacity, it is doubtful that the city is acting in its proprietary capacity in all the activities affected by the executive order. Even if this were so, the extensive preference for local residents contained in the executive order cannot come within the exception outlined by *Reeves* because it sweeps so broadly. In *Reeves*, the existence of a genuine shortage of concrete necessitated some form of rationing. The State's choice of favoring its own citizens was a rational means of allocation which recognized the special interests of local taxpayers. The executive order before us establishes a strict numerical requirement which is not at all targeted to the legitimate interests which the city has asserted. Given the order's negative impact on interstate commerce linked

circumstances it may be more difficult to find a violation of the privileges and immunities clause because the discrimination adversely affects citizens of the Commonwealth as well.[19] But see *Construction & Gen. Laborers Local 563* v. *St. Paul*, 270 Minn. 427, 431 (1965) (invalidating, partially on privileges and immunities grounds, a city ordinance requiring contractors on public building projects to hire only residents of the county in which the city was located).

B. *The Commerce Clause.*

The commerce clause, however, presents a clear obstacle to the city's order. Neither party would, we think, seriously dispute the proposition that an attempt by the city to apply the regulations contained in the order to all private construction would fall to such a challenge. Simple economic protectionism triggers a "virtually *per se* rule of invalidity." *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

The key question is whether the exception for a State (or one can safely say a municipality) as a market participant, discussed *supra*, serves to protect the mayoral order. In addition, we must consider our decisions and those of other courts which have held that in at least certain kinds of direct hiring, a municipality may employ only residents or may give preference to residents. See *Milton* v. *Civil Serv. Comm'n*, 365 Mass. 368 (1974); *McCarthy* v. *Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976); *Wardwell* v. *Board of Educ. of the City School Dist. of Cincinnati*, 529 F.2d 625 (6th Cir. 1976); *Detroit Police Officers Ass'n* v. *Detroit*, 385 Mich. 519 (1971).

We perceive, however, three key distinctions between the actions upheld in the cases cited by the defendants and the mayoral order. First, given the statement of agreed facts, there is no doubt that the implementation of the mayor's order will have a significant impact on those firms which engage in specialized areas of construction and employ permanent works crews composed of out-of-State residents.

[19] We do not reach the question whether such discrimination is contrary to the Massachusetts Constitution.

with this broad application, it must fall. Question 5 is to that extent answered in the affirmative and we therefore need not reach questions 4, 7, 9 and 10.

In summary, we answer questions 3 and 6 "no."

We answer question 2 "yes" to the extent outlined in part IV.

We answer question 5 "yes" to the extent outlined in Section V.

We decline to answer questions 1, 4, 7, 8, 9, and 10.

APPENDIX A1.

[A17-A18]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 80-115-CIVIL

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, ET AL.,
Plaintiffs,

v.

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON, ET AL.,
Defendants.

JUDGMENT

Following the opinion of the Court in *Massachusetts Council of Construction Employers* v. *Mayor of Boston*, Mass. Adv. Sh. (1981) 2039, it is ordered and declared that:

(1) The preference for residents of the Commonwealth in public works construction employment provided by G.L. c. 149, § 26, violates the privileges and immunities clause of Art. IV, § 2, of the United States Constitution.

(2) The requirement that private contractors fill fifty percent of the positions on city-funded construction projects with residents of Boston, contained in the Executive Order of the

Mayor of the City of Boston, violates the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution.

/s/ Herbert P. Wilkins
Associate Justice

Dated: November 23, 1981
A true copy,

/s/ John E. Powers
Clerk

Attest:
November 23, 1981

APPENDIX B.

[A19-A21]

CITY OF BOSTON
OFFICE OF THE MAYOR
CITY HALL, BOSTON

KEVIN H. WHITE
MAYOR

EXECUTIVE ORDER

WHEREAS there is a very high rate of unemployment in the City of Boston, particularly among the youth of the City, both white and minority;

WHEREAS the effect of this high level of unemployment has a serious, substantial and deleterious effect for all the neighborhoods of the City of Boston, resulting on the physical deterioration of the neighborhoods, vandalism, and crime;

WHEREAS there is a particularly high rate of unemployment and underemployment for Boston residents who have worked or seek work in the construction industry;

WHEREAS the City of Boston expends substantial sums of money derived from federal, state and city taxes paid by Boston residents upon public works projects in the City, hence City residents are entitled to receive some direct benefit from such expenditures;

WHEREAS in addition to the foregoing, the City is intent on satisfying its statutory obligation to give preference to its residents in hiring for publically [*sic*] funded construction projects pursuant to G. L. c. 149, § 26.

THEREFORE, I do hereby order that the following policy take effect as of October 15, 1979:

(1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

a. at least 50% by bona fide Boston residents;

b. at least 25% by minorities;

c. at least 10% by women.

For purposes of this paragraph worker hours shall include work performed by persons filling apprenticeship and on-the-job training positions.

(2) Each department of the City of Boston contracting with any private corporation or person for such construction projects, shall include in all such contracts the provisions of the City of Boston Supplemental Minority Participation and Residents Preference Section to insure compliance with this Executive Order.

(3) The Equal Employment Opportunity Contract Compliance Office of the City of Boston through the Awarding Authority shall be responsible for monitoring and enforcing the provisions of this Executive Order and the contract provisions established in accordance therewith.

(4) I urge the Boston Redevelopment Authority and the Economic Development and Industrial Corporation to incorporate the provisions of this policy into all the contracts for construction projects to which they fund or administer, and to which, in their capacity as owners are signatories.

(5) I direct the Vice-Mayor, the Corporation Counsel, the Assessor, and request the BRA staff to research the legal feasibility of the incorporation of this policy into the General Laws Chapter 212A process and if found to be legally feasible, I will incorporate this policy into that process and any other tax related development incentive process.

(6) I am filing today with the City Council a proposed ordinance which will punish those people who would misrepresent facts about themselves in order to become beneficiaries of this program.

Kevin H. White
Mayor

September 11, 1979
Date:

A22

Appendix C.

[A22-A29]

PREFACE 10/15/79

Pursuant to Mayor Kevin H. White's Executive Order concerning employment of Boston Residents, Minorities and females, effective October 15, 1979, Articles I and II of the "City of Boston Supplemental Minority Participation Section" have been amended. This amended document shall be known as the "City of Boston Supplemental Minority Participation and Resident Preference Section"

Article I contains definitions

Article II is concerned with the percentage of workhours for Minority Persons, Boston Residents and Females, per trade, for each Contractor(s) and subcontractor(s) respective workforce.

Article III concerning expenditures to Minority Business Enterprises represents no substantive changes in policies established July 1, 1978.

Approved as form:

by:_____ _____

Acting, Corporation Counsel Kevin H. White, Mayor

_____ _____

Clarence J. Jones, Deputy Mayor

Director, EEO/Contract Compliance

ARTICLE II: *Equal Employment Opportunity Program for Minorities, Females and Boston Residents (Labor)*

A. *Anti-Discrimination Affirmative Action*: During the performance of this contract, the General Contractor shall agree and shall require that his subcontractors agree to the following:

1. In connection with their performance of work under this contract, the Contractor shall not discriminate against any employee or applicant for employment because of race, color, religious creed, national origin, age or sex. The aforesaid section shall include but not be limited to, the following: employment upgrading, demotion or transfer, recruitment advertising, recruitment layoff, termination, rates of pay or other forms of compensation, conditions or priviledges of employment, and selection for apprenticeship or other training categories.

2. In connection with the performance of work under this contract, the Contractor shall undertake in good faith affirmative action measures designed to eliminate any discriminatory barriers in the terms and conditions of employment on the grounds of race, color, religious creed, national origin, age and sex, and to eliminate and remedy any effects of such discrimination in the past. Such affirmative action shall include positive measures to ensure equal opportunity in the areas of hiring, upgrading, demotion or transfer, recruitment, layoff or termination, rate of compensation and in-

service or apprenticeship and other training programs. Such affirmative action shall include all action required to guarantee equal employment opportunity for all persons, regardless of race, color, religious creed, national origin, age or sex. A purpose of this section is to ensure to the fullest extent possible an adequate supply of skilled trademen for this and future City public construction projects.

B. *Workforce Requirements (labor)*:

1. *Minority Workforce*: The Contractor and its subcontractors shall maintain not less than 25% ratio of minority employee manhours to total employee manhours in each trade worked on the contract.

2. *Boston Resident Workforce*: The Contractor and its subcontractors shall maintain a not less than 50% ratio of Boston Resident employee manhours to total employee manhours in each trade worked on this contract.

3. *Female Workforce*: The Contractor and its subcontractors shall maintain a not less than 10% ratio of female employee manhours to total employee manhours in each trade worked on this contract.

4. The workforce requirements of paragraphs (1), (2) and (3) above shall apply to each trade that appears on the list of "Classification and Minimum Wage Rates" as determined by the Commissioner of Labor and Industries under the provisions of Chapter 149, Sections 26 through 27G, of the General Laws of Massachusetts, as amended.

5. The Contractor and its subcontractors shall be deemed to be in compliance with paragraphs (1), (2) and (3) above, if said Contractor has complied with Section E, paragraph 6. and has demonstrated to the satisfaction of the Compliance Unit and Liaison Committee that said Contractor has taken all reasonable steps to so comply with the provisions of this Article.

C. *Training*: The Contractor and its subcontractors shall fill not less than 50% of all training categories with Boston Residents, provided that whenever possible a greater percentage of Boston Residents shall be utilized in all training and apprenticeship categories.

D. *General Procedures*:

1. *Pre-Bid Conference*: The Awarding Authority in conjunction with the Contract Compliance Unit may conduct at least one pre-bid conference to explain the workforce requirements of this Article. At such conference the Awarding Authority or Contract Compliance Unit shall inform all parties thereto in writing of the names, street addresses, and telephone numbers of all designated job referral agencies.

2. *Liaison Committee*:

a. There shall be established by the Compliance Unit a body known as the Liaison Committee. This Committee shall be composed of one representative each from the following:

1. The Director of the Compliance Unit
2. City of Boston Minority Business Office
3. City of Boston Employment & Economic Policy Administration
4. City of Boston Office of Federal Relations
5. Association of General Contractor
6. Building Trades Employers Association
7. Building Trades Council
8. Third World Jobs Clearinghouse
9. Contractors Association of Boston
10. Boston Jobs Coalition
11. Greater Boston Y.W.C.A.
12. Community Task Force on Construction
13. Recruitment and Training Program

b. The Compliance Unit Director or his designee shall chair each meeting. The Chairperson shall vote only in the event of a tie. All other members of the committee shall have one vote. All decisions of the Liaison Committee shall be made by majority vote.

c. The Contractor, its subcontractors and the Awarding Authority shall recognize the Liaison Committee as an advisory body and consult and cooperate with it on all matters related to Minority Person, Boston Resident and female recruitment, referral, employment, training and on going implementation of and compliance with this Article.

d. The Liaison Committee shall hold monthly meetings to assure compliance with this Article. Liaison Committee meetings shall be open to the public.

e. The Liaison Committee shall make recommendations to the Compliance Unit and/or Awarding Authority with respect to necessary actions to assure compliance with this Article.

f. All information received by the Awarding Authority or Compliance Unit with respect to compliance with the Article shall be made available, to the Liaison Committee, upon request, after 7 days of said request.

g. No voting representative of the Liaison Committee shall be removed from or added to said committee except by a majority vote of the committee.

E. *Compliance After Contract Award*

1. The Contractor and its subcontractors shall prepare and submit to the Awarding Authority weekly manpower utilization reports, in a form approved by the Awarding Authority, not later than the Tuesday following each week work is performed. Said report shall include hours worked in each trade and job category by each employee identified as (1) Minority or non-minority; (2) Resident or non-resident; and (3) female or male. Said report shall also include each employee's name, street address and telephone number.

2. Referral orders and records of each Contractor's and subcontractors' attempts to recruit minorities, resident and female employees shall be maintained and made available to the Compliance Unit upon request after 7 days of said request.

3. In the hiring of minorities, residents and females as journeymen, apprentices, advanced trainees, trainees and helpers, the Contractor and its subcontractors may rely on traditional referral methods utilized by the construction industry, and shall also rely on referrals from the Employment and Economic Policy Administration (EEPA) and its designees

such as: ABCD, OIC, Third World Jobs Clearinghouse, Boston Jobs Coalition, RTP, YWCA, and other community based organizations as from time to time exist, to provide minority persons, Boston residents, and females. Referrals of Minority Persons, Boston Residents and females will be done via the existing EEPA designed and coordinated city-wide referral mechanisms for jobs in construction as formalized by Third World Jobs Clearinghouse utilizing the aforementioned designees. De-designation of the aforementioned community based referral agencies shall be recommended by EEPA and approved by the Liaison Committee.

4. The Compliance Unit and any so designated representative of the Liaison Committee shall have the right of access to the construction site in order that on-site visits may be conducted.

5. The Contractor and its subcontractors shall provide all information and reports required at the request of either the Awarding Authority or the Compliance Unit and shall permit access to its facilities and any books, records accounts and other source of information which may be determined by the Compliance Unit with respect of the employment of personnel. This paragraph shall apply only to information pertinent to compliance with this Section. Where information required is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so demonstrate to the Compliance Unit and shall set forth what efforts he has made to obtain this information.

6. For any trade described in section (B) (4) above, for which the contractor's or subcontractors' weekly manpower utilization report, paragraph (1) above, indicates the workforce requirements of section (B) (1), (2) and/or (3) were not met, the Contractors and its subcontractors shall submit along with said report a statement setting forth the following information:

(a) The names of all persons who applied for work in that trade indicating which persons were (1) Minority (2) a Resident and (3) Female.

(b) The reasons any person identified as (1) Minority (2) Resident or (3) Female was not hired.

(c) The reasons why any person identified as (1) Minority (2) a Resident or (3) Female, was employed fewer hours than (1) non-minorities, (2) non-residents or (3) male employees.

(d) All efforts by the Contractor or its subcontractors to effectuate the requirements of Section (b) (1) (2) and (3).

APPENDIX D.

[A30-A47]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 80-115-Civil

MASSACHUSETTS COUNCIL OF
CONSTRUCTION EMPLOYERS, ET AL.,
Plaintiffs,

v.

KEVIN H. WHITE, MAYOR OF
BOSTON, ET AL.,
Defendants.

AGREED STATEMENT OF FACTS

The parties stipulate and agree that the following facts are true. The parties reserve the right to argue that the agreed facts are irrelevant or immaterial to the resolution of the legal questions.

The Parties

1. *Plaintiffs*: (a) The plaintiff Massachusetts Council of Construction Employers, Inc. (MCCE) is a Massachusetts cor-

poration organized under the provisions of G.L. c. 180, with its usual place of business in Boston, Massachusetts. MCCE is a membership corporation comprised of a number of contractor associations throughout the Commonwealth of Massachusetts. (A listing of those contractor associations is attached to the complaint as Exhibit E.) MCCE member associations include contractors who perform commercial, industrial and public construction in the Commonwealth and elsewhere, including public construction in the City of Boston within the meaning of c. 149, § 26, c. 149, §§ 44A-44L, and c. 30, § 39M. The contractors also perform construction on c. 121A projects. Certain of the contractors have been and will be applicants for approval of Chapter 121A status for their projects.

(b) The individual contractor plaintiffs, listed in Exhibit A annexed to the complaint, are contractor members of MCCE Contractor Associations who have performed construction services for the City of Boston.

(c) The plaintiff Massachusetts Building and Construction Trades Council, AFL-CIO, is an unincorporated membership association comprised of building and construction trade unions in the Commonwealth of Massachusetts. It has a usual place of business in Boston, Massachusetts. Members of its constituent unions are employed by contractors under the terms of collective bargaining agreements between those unions and contractors. The vast majority of the members of the constituent unions are residents of the Commonwealth of Massachusetts; some are not.

(d) Plaintiff Building and Construction Trades Council of the Metropolitan District, AFL-CIO, is an unincorporated membership association composed of the building and construction trade unions within the Greater Boston Metropolitan area. It is in turn a part of the Massachusetts State Building and Construction Council, AFL-CIO. It has a usual place of business in Boston, Massachusetts.

(e) The plaintiff individuals listed in Exhibit A annexed to the complaint are individuals who are not residents of the City of Boston, and some who are not residents of the Commonwealth of Massachusetts, but residents of the places designated and members of the unions so designated. The designated unions are members of the Building and Construction Trades Council of the Metropolitan District, AFL-CIO.

2. *City Defendants*: (a) The defendant City of Boston is a municipal corporation, established pursuant to the Acts of 1854, c. 448, the Acts of 1909, c. 486 as amended by Acts of 1948, c. 452 and the Acts of 1951, c. 376. The current charter establishes a strong mayor form of government.

(b) The defendant Economic Development and Industrial Corporation (EDIC) was established in 1971 by St. 1971, c. 1097. The purpose of the corporation is to attract new industrial manufacturing companies to the City of Boston in order to eliminate substandard areas with substantial unemployment. The EDIC is governed by seven directors appointed by the mayor (subject to confirmation by the City Council), two of whom must be members of the Development and Industrial Commission of the City. The EDIC is deemed to be an agency of the City of Boston established by the General Court to serve a public purpose of the Commonwealth. The EDIC, among other things, has the authority to:

(i) receive grants, loans, advances and contributions from any federal agency, the Commonwealth, the City of Boston or any other source;

(ii) borrow money and issue revenue bonds payable solely from revenues of the corporation;

(iii) acquire real and personal property by, among other things, purchase, grant or the exercise of power of eminent domain;

(iv) finance mortgages on real estate and personal property within economic development areas;
(v) manage any economic development project whether owned or leased by the corporation.

No economic development project may be taken until a public hearing covering such project has been held by the EDIC and the economic development plan has been approved by the City Council and the Mayor. Since its inception it has assisted in industrial developments in the City, most notably at the Boston Marine Industrial Park, the Alsen-Mates Industrial Park, and the Cross Town Industrial Park. In addition, the EDIC has maintained a job training center the purpose of which is to impart skills to the unemployed of Boston in order that they might take advantage of the employment opportunities from the companies locating in Boston pursuant to the EDIC's activities.

(c) The Boston Redevelopment Authority (BRA) is the urban renewal agent of the City. It is governed by a Board of Directors appointed by the Mayor. It is authorized to declare certain areas of the City as "blighted areas". Pursuant to a Declaration of Blight, the BRA may purchase or take parcels within the area and clear the parcels for purposes of renewal for commercial or residential purposes. It has the authority to grant to developers special tax treatment authorized by G.L. c. 121A.

3. *State Defendant*: The state defendant is the Department of Labor and Industries (the Department), established pursuant to G.L. c. 23, §§ 1-7. The Department is responsible for the administration and enforcement of the provisions of G.L. c. 149, § 26, pursuant to G.L. c. 149, § 2.

4. *Intervenor*: (a) The Boston Jobs Coalition, Inc. (BJC) is a coalition of approximately 42 community, labor and minority

organizations and hundreds of individuals. One of the BJC's primary goals has always been to urge government, labor, and construction industry officials to make more construction jobs available to minority workers, women workers, and Boston residents. It has negotiated with the City of Boston over the past six years for the promulgation of the Executive Order subject to challenge.

(b) The BJC is a member of the liaison committee established to monitor compliance with the Executive Order and the contract provisions included in Appendix A to the Answer. BJC is also a designated referral agency for Boston residents in said contract provisions.

The Challenged Order and Statute

5. *The Executive Order*: On September 11, 1979, the Mayor promulgated an Executive Order. A copy of the Executive Order is attached as Appendix 1.

6. *G.L. c. 149, § 26*: (a) General Laws c. 149, § 26, reproduced as Appendix 2, provides, in relevant part, that in the employment of employees in the construction of public works by the Commonwealth, or by a county, town, or district, preference shall first be given to citizens of the Commonwealth who have been residents of the Commonwealth for at least six months and who are male veterans and who are qualified to perform the work; and secondly to citizens of the Commonwealth generally who have been residents of the Commonwealth for at least six months. The statute also provides that with respect to a county, town, or district, preference be given to veterans and citizens who are residents of such county, town or district.

(b) As administered by the Department, G.L. c. 149, § 26, establishes a preference for qualified residents of the Commonwealth in employment in the construction of public works

by the Commonwealth or its political subdivisions. No distinction is made between citizens of the Commonwealth and aliens lawfully residing in the Commonwealth. As a matter of policy and with the belief of probable unconstitutionality, the Department does not enforce that portion of § 26 which creates a local preference as between Massachusetts residents residing in different municipalities in the public works construction of the counties, towns or districts. The plaintiffs do not challenge the preference for veterans, the durational residency aspects or any other portion of § 26.

The Facts

7. The objectives of the residency aspects of the Executive Order include:

(a) The promotion of the employment of residents of the City of Boston and the concomitant alleviation of the unemployment of Boston residents.
(b) The reduction in the level of economic and social costs to the City of Boston, which have an adverse multiplier effect, arising from the unemployment of residents of the [*sic*] Boston.
(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax dollars and federal grants and entitlements within the city's economy.
(d) Ensuring that Boston residents receive some direct benefit from public works projects funded in part by federal, state and city taxes paid by Boston residents.

8. If necessary, the City would introduce testimony from City Officials to the effect that a purpose of the residency aspects of the Executive Order includes the alleviation of the aggravation of racial tension in the City arising out of a perceived favoritism for minorities in previous City affirmative action efforts.

9. The parties agree that the effects of the residency aspects of the Executive Order include:

(a) The promotion of the employment of residents of the City of Boston and the concomitant alleviation of the unemployment of Boston residents.

(b) The reduction in the level of economic and social costs to the City of Boston, which have an adverse multiplier effect, arising from the unemployment of residents of the [*sic*] Boston.

(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax dollars and federal grants and entitlements within the city's economy.

(d) Ensuring that Boston residents receive some direct benefit from public works projects funded in part by federal, state and city taxes paid by Boston residents.

(e) Correlation of the ethnic and racial composition of construction workers on affected projects with the ethnic and racial make-up of the City.

(f) A reduction in the amount of absenteeism and tardiness on public construction because non-resident public construction workers who live substantial distances from the City can experience delays or difficulties in travel.

(g) An increase in the skills, competence and experience of those Boston residents who are actually referred for

employment by virtue of the Executive Order and who would not normally have been working on public construction projects.

(h) A termination of existing employment by some Boston residents who will seek employment opportunity made available by the Executive Order.

(i) Unemployment of certain construction workers who are non-residents of the City of Boston and non-residents of Massachusetts who otherwise would have been employed on projects to which the Executive Order has been applied.

(j) Discouragement of some contractors located outside the City of Boston and some contractors located outside the Commonwealth of Massachusetts from bidding on public construction work resulting in higher costs of public construction because of fewer competitive bids.

(k) Increased costs for those contractors who actually perform work covered by the Executive Order.

10. The parties agree that the effects of the residency aspects of the Executive Order which may possibly occur include:

(a) A diminution of antagonism which some Boston neighborhoods may have toward construction projects in their community; this antagonism may lead to neighborhood friction and vandalism during construction and afterwards. An improvement of the relationships between City employees and those performing construction jobs leading to a smoother and more expeditious construction schedule.

(b) An increase in the antagonism which some non-residents of Boston may have because of having been deprived of work opportunity; this antagonism may lead to the exclusion of employment opportunities for Boston residents in surrounding communities.

(c) An increased feeling of stake in the City's progress and a greater willingnes to make an extra effort to perform quality work on City construction on the part of some Boston residents. An unwillingness to disrupt job performance because of dissatisfactions or grievances on the part of some Boston residents.

(d) A decreased feeling of stake in the City's progress and a lesser willingness to make an extra effort to perform quality work on City construction and an increased tendency to disrupt job performance because of dissatisfaction or grievances by some non-residents of Boston by reason of their fear of diminished expectation of future employment on Boston jobs.

11. If necessary, the City would introduce testimony that an effect of the residency aspects of the Executive Order includes the alleviation of the aggravation of racial tension in the City arising out of a perceived favoritism for minorities in previous City affirmative action efforts. The plaintiffs would introduce testimony that the residency aspects of the Executive Order would not include an effect of alleviating the aggravation of racial tension in the City arising out of a perceived favoritism for minorities in previous City affirmative action efforts.

12. The objectives of the relevant portions of G.L. c. 149, § 26, include:

(a) The promotion of the employment of residents of the Commonwealth and the concomitant alleviation of the unemployment of Commonwealth residents.
(b) The reduction in the level of economic and social costs to the Commonwealth, which have an adverse multiplier effect, arising from the unemployment of residents of the Commonwealth.
(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax dollars and federal grants and entitlements within the state's economy.
(d) Ensuring that Commonwealth residents receive some direct benefit from public works projects funded in part by federal, state and local taxes paid by Commonwealth residents.

13. The parties agree that the effects of the relevant portions of G.L. c. 149, § 26, include:

(a) The promotion of the employment of residents of the Commonwealth and the concomitant alleviation of the unemployment of Commonwealth residents.
(b) The reduction in the level of economic and social costs to the Commonwealth, which have an adverse multiplier effect, arising from the unemployment of residents of the Commonwealth.
(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax dollars and federal grants and entitlements within the state's economy.

(d) Ensuring that Commonwealth residents receive some direct benefit from public works projects funded in part by federal, state and local taxes paid by Commonwealth residents.

(e) The reduction in the amount of absenteeism and tardiness on public works construction because non-resident employees living substantial distances from affected projects can experience delays or difficulties in travel.

(f) An increase in the skills competence and experience of those Massachusetts residents who are actually preferred for employment by virtue of § 26 and who would not normally have been working on public construction projects.

(g) The preclusion of some out-of-state employers who do not hire Commonwealth residents from obtaining public works construction contracts in the Commonwealth.

(h) The incidence of greater costs for public work construction because of fewer competitive bids due to the discouragement of some out-of-state contractors from bidding and because of greater employment costs for the out-of-state contractors performing the public construction work.

(i) A termination of existing employment by some Commonwealth residents who will seek employment opportunity made available by § 26.

(j) Unemployment of certain construction workers who are not residents of Massachusetts who otherwise would have been employed on projects to which G.L. c. 149, § 26, is applied.

14. The parties agree to use the unemployment data from the Massachusetts Division of Employment Security for the

purpose of this case. The data are attached hereto as Exhibit A. It is understood that, in the compilation of these figures, individuals who did not make specific efforts to find a job within the four (4) weeks prior to the survey week and individuals who were unavailable for work during the survey week for reasons other than temporary illness were not considered "unemployed."

15. (a) A small number of plaintiff contractors are out-of-state contractors who have regular and permanent work crews comprised entirely of out-of-state residents. These contractors for the most part are those who perform specialty work such as waterproofing, precast concrete installation, window installation and stack and tank fabrication and erection. The vast majority of out-of-state contractors also have regular and permanent work crews but generally receive the majority of the members of the work crews from the local unions in whose geographical jurisdiction the work is being performed.

(b) Most of the plaintiff Massachusetts contractors have regular and permanent work crews which are not selected on the basis of residence; such crews constitute less than 50% of the contractors' employees on affected projects. The Executive Order will require some of these contractors to lay off some of those regular and permanent employees. When these contractors need additional employees, they obtain such additional employees either by direct hire and more frequently by utilizing local unions in whose geographical jurisdiction the work is being performed. Contractors who are party to collective bargaining agreements having exclusive hiring hall provisions are required to obtain the additional employees from the local union.

16. Non-resident employees and employers have been, are, and will continue to be employed on public construction work in the Commonwealth of Massachusetts and in the City of Boston.

17. The Executive Order is applicable and enforceable on affected projects by the inclusion of the Minority Participation and Resident Preference Section (Appendix A of the City's Answer and incorporated herein by reference) in all construction bid specifications.

18. (a) The total dollar volume of construction, both private and public, in the Commonwealth of Massachusetts in 1980 was approximately $2.7 billion; of that amount approximately $675 million or 25 percent represented public construction work to which G.L. c. 149, § 26, was applicable.

(b) The approximate dollar value of construction, both private and public, within the City of Boston in 1980 was $482,886,000; of that amount approximately 54,421,040 represented construction projects "funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract" to which the Executive Order, by its terms, was applicable. Of that $54,421,040 approximately $34,000,000 represented projects involving Urban Development Action Grants. Also, of that $482,886,000 approximately $65,277,530 represented Chapter 121A projects to which the BRA's "Rules and Regulations Governing Chapter 121A Projects in the City of Boston" were applicable.

(c) Approximately 50% of the value of construction contracts is allocated to labor costs and approximately 50% of the value of construction contracts is allocated to non-labor costs.

19. (a) The Boston Redevelopment Authority requires as a condition of approval of Chapter 121A applications a commitment to comply with Section 8 of the BRA's "Rules and Regulations Governing Chapter 121A Projects in the City of Boston," which provides as follows:

The Applicant shall state that the 121A entity or any contractor working for the 121A entity will, to the best of its ability grant preference in hiring to Boston residents during the construction period and during the period of management of the Project. To the extent possible employers under contract to (including subcontractors), or leasing from, the 121A entity will be required to list all job openings with the City of Boston CETA office, ten (10) working days in advance of any public advertisement of the positions. Any employer under 121A, who utilizes the State Division of Employment Security to find job applicants, will be required to specify in this request a preference for City of Boston residents. This requirement shall be consistent with all applicable collective bargaining requirements.

(b) The provisions of the Executive Order have been applied by the Boston Redevelopment Authority, the Economic Development Investment Corporation and the City of Boston, to projects funded in whole or in part with City funds, or funded with federal monies which the BRA or the EDIC or the City has an obligation to administer which heretofore have included: (i) Urban Development Action Grants (UDAG) pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et. seq.* and the Housing and Community Development Act of 1977, P.L. 95-128, 91 STAT. 1111, which is administered by the Department of Housing and Urban Development. The UDAG regulations are at 24 C.F.R. § 570. (ii) Community Development Block Grants (CDBG) pursuant to Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et. seq.*, administered by the Department of Housing and Urban Development, which has issued implementing regulations at 24 C.F.R. § 570.

(iii) Economic Development Administration (EDA) Grants administered by the Economic Development Administration within the United States Department of Commerce 42 U.S.C. §§ 3131, et seq. The implementing regulation [*sic*] are at 13 C.F.R. 305.

(c) The provisions of the Residency Executive Order have been applied by the Boston Redevelopment Authority, the Economic Development Industrial Corporation and the City as a condition to the approval of Urban Development Action Grants.

20. (a) The plaintiff contractors and unions are parties to collective bargaining agreements which are currently in effect and establish the wages hours conditions [*sic*] of employment and hiring procedures for all employees in the respective trades employed by the plaintiff contractors. Such agreements are renegotiated periodically. Exhibit B includes some applicable provisions.

(b) When contractors are required to comply with federal, state or municipal affirmative action requirements for minorities, such contractors will request from unions and unions will attempt to refer such contractors minority workers.

21. Exhibit C sets forth statistics indicating the number of residents currently participating in the contractors' and unions' apprenticeship programs. These data were developed subsequent to the enactment of G.L. c. 149, § 26, and subsequent to the promulgation of the Executive Order.

22. Exhibit D contains statistics for the number of residents of certain member locals of the plaintiff Building and Construction Trades Council of the Metropolitan District, AFL-CIO. These data were developed subsequent to the enactment of G.L. c. 149, § 26, and subsequent to the promulgation of the Executive Order.

23. Exhibit E contains computations made by the City of Boston's Contract Compliance Office and are representative of

the residency of publicly-funded construction work crews in the years 1978, 1979, and 1980.

24. (a) Plaintiff contractors are subject to Executive Order 11246; Title VI and Title VII of the Civil Rights Act of 1964; guidelines issued by the Office of Federal Contract Compliance codified as 41 CFR 60-4, as last amended by 45 FR 65-979; and Commonwealth of Massachusetts Administrative Bulletin 75-14.

(b) The plaintiff contractors and the plaintiff unions are subject to the regulations issued by the United States Department of Labor concerning non-discrimination in apprenticeship. The rules are codified as 29 CFR 30; they are also subject to St. 1941, c. 707, which is administered by the Division of Apprentice Training, Department of Labor and Industries of the Commonwealth of Massachusetts.

25. Chapter 149, § 26 applies to various construction projects which involve federal funds. The Department of Transportation the Department of Housing and Urban Development and the Economic Development Administration are among the federal agencies which have contributed funding to state and/or local public construction projects to which § 26 applies. These agencies have promulgated regulations relating to the disbursement of these funds, applicable to the Commonwealth, its instrumentalities and their contractors, which regulations are contained at: 24 CFR §§ 570, *et. seq.* (HUD); 13 CFR §§ 305 *et seq.* (EDA); and 23 CFR §§ 635 *et seq.* (DOT).

26. The plaintiffs have made no complaints to any of the agencies described in paragraph 25 regarding the application of the Executive Order and G.L. c. 149, § 26, to construction projects which involve funds from such agencies.

27. Attached as Exhibit F is a compilation of the residency aspects of the work force on all city-funded construction projects for the month of December, 1978. Attached as Exhibit G

is a compilation of the residency aspects of the work force for one contractor on the Occupational Resource Center for the period July 23, 1978, through March 3, 1979.

28. The preliminary 1980 census data shows that the current population of the City of Boston is 562,582. Of that number 69% are white, 20% are black, 6% are hispanic, and 4% are oriental. The City of Boston is contesting this population figure of 562,582 as less than the actual population.

29. Exhibit H shows the population of Boston as compared with the other 20 largest cities in the nation over a 30 year period.

30. Exhibit I shows the per capita income of Boston residents as compared with the state and the nation for the period between 1965 and 1978. The Boston Metropolitan Counties are Essex, Middlesex, Plymouth, Norfolk and Suffolk.

31. Exhibit J shows the unemployment rates for Boston, the SMSA (the Boston Metropolitan area), Massachusetts, and the United States between 1970 and October, 1980.

32. Exhibit K is the per capita income ranking of the counties in which the nation's largest cities are located for the years 1929, 1959 and 1975.

33. Exhibit L shows the number of jobs in Boston and in the Boston Metropolitan area (Boston SMSA) in 1975.

34. Exhibit M shows the breakdown of those jobs stated in Appendix P by industry.

35. Exhibit N compares Boston with the other major cities of the nation on the basis of job-to-population ratios.

36. Exhibit O is a graph showing the comparative wage rates of Boston residents against Boston Metropolitan area residents over a 50 year period. The Boston Metropolitan Counties are Essex, Middlesex, Plymouth, Norfolk and Suffolk.

37. Exhibit P shows the number of Boston residents and the number of commuters who worked in Boston between 1960 and 1977.

38. Exhibit Q shows the amount of construction in the City broken down by new construction, alterations and miscellaneous permits between 1966 and 1979.

39. There exists an actual controversy between the parties with respect to the implementation and enforcement of G.L. c. 149, § 26, the Executive Order and Section 8 of the BRA's rules and regulations.

40. To the extent that the parties have stipulated to facts which vary from the pleadings, the pleadings are amended accordingly.

For the plaintiffs: /s _____
Paul J. Kingston
Paul V. Mulkern, Jr.,

For the City defendants: /s _____
Gerard J. Clark

For the State defendant: /s _____
E. Michael Sloman
Carl Valvo

For the defendant-intervenors: /s _____
Kurt M. Pressman
Mark Stern

Date: April 21, 1981

APPENDIX E.

EXHIBIT E

The breakdown of the work force on city funded construction for given months are as follows:

Month	Total Workers	Boston Residents	Percentage Boston Residents	Non-Mass. Residents	Percentage Non-Mass. Residents
December, 1978	443	172	38.8%	5	1.1%
February, 1979	505	105	20.79%	3	.6%
March, 1979	114	41	36%	8	7%
May, 1979	534	215	40%	1	.2%
September, 1979	641	209	33%	7	1.1%
August, 1980	128	50	36%	11	8%
September, 1980	120	53	44%	11	8%
October, 1980	170	98	57%	3	1.7%

APPENDIX F.

[A49-A50]

EXHIBIT F

RESIDENCY OF THE WORKFORCE ON ALL CITY-FUNDED CONSTRUCTION PROJECTS FOR THE MONTH OF DECEMBER, 1978

I. BREAKDOWN OF WORKFORCE		Percentage
a. Total Number of Workers:	443	
b. Total Boston Workers	172	38.8%
c. Total non-Boston, Massachusetts workers	259	58.5%
d. Total non-Massachusetts workers	12	2.7%
e. Total non-Massachusetts workers employed on projects with less than 50% Boston residents	7	1.6%

II. BREAKDOWN OF EMPLOYERS		
a. Total number of employers	67	
b. Number of employers who employed non-Massachusetts residents	8	11.9%

III. EMPLOYERS WHO EMPLOYED NON-MASSACHUSETTS WORKERS AND HAD AT LEAST 50% BOSTON RESIDENTS

a. Napoli Wrecking Co., Dorchester, MA: (4 Boston, 3 N.H., 1 other Mass.)	8 employees
b. H. Piker & Co., address unknown: (5 Boston, 1 N.H., 1 R.I., 2 other Mass.)	10 employees

c. H. Carr & Sons, Providence, R.I. 2 employees
(1 Boston, 1 R.I.)

IV. EMPLOYERS WHO EMPLOYED NON-MASSACHUSETTS WORKERS AND DID NOT HAVE AT LEAST 50% BOSTON RESIDENTS

a. Wexler Construction Co., Needham, MA 41 employees
(15 Boston, 1 R.I., 25 other Mass.)
b. Old Colony Crushed Stone Construction Co., Quincy, MA 14 employees
(3 Boston, 2 R.I., 9 other Mass.)
c. Erection Specialists, address unknown 7 employees
(2 Boston, 1 R.I., 4 other Mass.)
d. National Plate & Window Glass Co., address unknown
(1 N.H., 1 other Mass.) 2 employees
e. E.T. Ryan Iron Works, Inc., address unknown 13 employees

Joint Appendix

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1003

In the Supreme Court of the United States

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

JOINT APPENDIX

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Relevant Docket Entries.

March 20, 1980	— Complaint for Declaratory Judgment Pursuant to Mass. G.L. c. 231A filed.
September 19, 1980	— Answer of Defendants White, City of Boston, and Economic Development & Industrial Corp. filed
December 24, 1980	— Answer of Defendant-Intervenor Boston Jobs Coalition filed
February 23, 1981	— Reservation and Report of single justice filed
August 28, 1981	— Opinion of Supreme Judicial Court filed
November 23, 1981	— Judgment of Supreme Judicial Court filed

Agreed Statement of Facts.

EXHIBIT A.

Unemployment Rates 1970-1980 for
Boston SMSA-Massachusetts-United States.

Period	City of Boston	Boston SMSA	Massachusetts*	United States*
1970	4.9	4.0	4.6	4.9
1971	7.1	5.7	6.6	5.9
1972	8.0	6.5	6.4	5.6
1973	8.4	6.9	6.7	4.9
1974	8.7	7.1	7.2	5.6
1975	12.8	10.5	11.2	8.5
1976	11.1	9.1	9.5	7.7
1977	9.5	7.8	8.1	7.0
1978	7.2	5.9	6.1	6.0
1979	6.5	5.3	5.5	5.8
January	8.6	7.0	7.5	6.4
February	7.6	6.2	6.6	6.4
March	7.6	6.2	6.7	6.1
April	6.1	5.0	5.3	5.5
May	6.0	4.8	5.0	5.2
June	6.2	5.0	5.1	6.0
July	5.8	4.7	5.0	5.8
August	5.7	4.6	4.7	5.9
September	7.9	6.5	6.4	5.6
October	5.2	4.2	4.4	5.6
November	5.3	4.3	4.8	5.6
December	5.5	4.4	5.1	5.6

(cont'd)

Agreed Statement of Facts.

EXHIBIT A (*cont'd*):

Unemployment Rates 1970-1980 for
Boston SMSA-Massachusetts-United States.

Period	City of Boston	Boston SMSA	Massachusetts*	United States*
1980				
January	6.9	5.6	6.4	6.8
February	6.1	5.0	5.7	6.8
March	5.7	4.6	5.3	6.6
April	5.4	4.4	5.0	6.6
May	6.4	5.4	5.8	7.0
June	7.2	5.9	6.6	7.8
July	6.4	5.2	6.1	7.9
August	6.6	5.3	6.0	7.5
September	6.7	5.5	5.9	7.1
October	6.1	5.0	5.6	7.1

Source: Massachusetts Division of Employment Security
December 1980

*: Nonseasonally Adjusted

EXHIBIT G.

WORKSHEET FOR WEEKLY REPORTS

H. Carr & Sons, Inc.
Providence, Rhode Island

Project: Occupational Resource Center
Period: 7/23/78 to 3/3/79

F. Bradshaw (R.I.) — 32 + 40 + 40 + 40 + 16 + 24	=	192
R. Jorge (R.I.) — 16	=	16
F. Zwalinzke (R.I.) — 40 + 40 + 40 + 24	=	144
J. Francois (*Roxbury*) — 40 + 40 + 40 + 32 + 8 + 16 + 16	=	192
J. Lynch (R.I.) — 20 + 20 + 32 + 8 + 24 + 16 + 24	=	184 [*sic*]
J. Carroll (*J.P.*) — 40 + 40 + 32	=	112
M. Kelly (R.I.) — 8	=	8
E. Cook (R.I.) — 8	=	8
V. McElroy (unknown) — 24	=	24
R. Kritchmar (unkn) — 32 + 24 + 16	=	72
G. Magazine (unkn) — 32	=	32
J. Shallew (Braintree) — 20	=	20

TOTAL HOURS — 1004

Total Mass.	324
Total R.I.	552
Total Unknown	128
Total Boston	304

TOTAL WORKERS — 12

Total Mass.	3
Total R.I.	6
Total Unknown	3
Total Boston	2

Agreed Statement of Facts.

Exhibit J.

Unemployment Rates.

	1970	1975	1976	1977	1978	1979	June 1979*	June 1980*
Boston	4.3%	12.8%	11.1%	9.5%	7.2%	6.5%	6.2%	7.2%
Boston SMSA ...	3.7	10.5	9.1	7.8	5.9	5.2	5.0	5.9
Massachusetts ..	4.6	11.2	9.5	8.1	6.1	5.5	5.1	6.6
New England ..	5.3	10.3	9.0	7.6	5.7	5.4	5.3	6.4
United States ...	4.9	8.5	7.7	7.0	6.0	5.8	6.0	7.8

*Not seasonally adjusted.

Sources: U.S. Bureau of Labor Statistics; Mass. Div. of Employment Security.

EXHIBIT P.

III. Jobs Held by Boston Resident-Workers

	1960	1970	1977
Total Boston Jobs	550,561	575,668	516,661
Boston Resident-Workers	262,416	237,211	212,892
Commuters	288,145	338,457	303,769
Boston Residents Percent Share	48%	41%	41%
Boston Workers	300,812	278,363	272,674
Working in Boston	262,416	237,211	212,892
Working outside Boston	38,396	41,152	59,782

Source: BRA, based on the 1960 and 1970 U.S. Census of Population and Housing, and Mass. Division of Employment Security.

[Caption Omitted.]

Motion of Boston Jobs Coalition, Inc., to Intervene as Defendant.

The Boston Jobs Coalition, Incorporated, respectfully moves the Court for leave to intervene as a defendant in the above-entitled matter, pursuant to Rule 24 of the Massachusetts Rules of Civil Procedure.

In support of its motion, the Boston Jobs Coalition, Incorporated (hereinafter referred to as the "BJC") states as follows:

1) That it is an organization which has a membership consisting of 42 community, social service, minority, and labor organizations in the City of Boston (see attached list), as well as numerous individual Boston resident members. The BJC is representative of the special interests of the persons for whose benefit the challenged Residency Executive Order was promulgated. The BJC and their counsel have special expertise regarding questions of policy and law raised by plaintiff's complaint.

2) That the BJC is in large measure responsible for the formulation and promulgation of the Residency Executive Order which is being challenged by the plaintiffs. In June, 1977, the BJC first proposed this concept to the Mayor's Office, and as a result of extensive negotiations between the BJC, City of Boston, and other parties, said Executive Order, as well as contract provisions to implement it, were drafted by attorneys for the BJC and the City of Boston. The BJC is a member of the liaison committee established to monitor compliance with the Executive Office and the contract provisions, and it is specifically designated as a referral agency for Boston residents in said contract provisions.

3) That for at least the past several years there has been considerable tension and antagonism in the City of Boston

among people of different races and nationalities, that the high level of unemployment among white and minority workers in this City is one of the major causes of this racial tension, which has had a major disruptive effect upon the City; and that the Residency Executive Order promulgated by Mayor Kevin White is a reasonable and concrete effort to ameliorate this problem by insuring a fair proportion of the publicly-funded construction projects jobs in this City are available to both white and minority workers.

4) That the special interests of residents of the City of Boston, minorities and women, who are the intended beneficiaries of said Residency Executive Order, are not adequately represented by any of the existing parties in this action.

5) That the disposition of the pending action may impair or impede the ability of the BJC's constituency, as well as that of other minorities, women and Boston residents to protect their interests and obtain employment in the City of Boston.

6) That this intervention will not in any manner delay the disposition of this case and that it will not raise any jurisdictional or venue questions.

A copy of the BJC's proposed Motion to Dismiss, in lieu of an Answer, is attached hereto.

The Boston Jobs Coalition, Inc.,
By their attorneys,

KURT PRESSMAN
678 Massachusetts Avenue
Cambridge, MA 02139
492-8473
MARK STERN
11 Meridian Street
Boston, MA 02128
567-6611

Date: April 15, 1980

Boston Jobs Coalition

The following organizations have officially and formally endorsed the activities, goals and principles of the Boston Jobs coalition, by action of their governing body or general membership (listed names are organization's contact person):

1) Charlestown Economic Development Corporation
   241-8866
   Bill Winder
2) Jamaica Plain Neighborhood Development Corporation
   Mike Gondek 522-7593
3) Fenway Tenant Development Corporation
   Jerry Nash 247-2778
4) South Boston Clergy Association
   Father Phil Conroy 268-1230
5) National Lawyers Guild
   Attorney Kurt Pressman 661-8898
6) East Boston Interagency Council
   Joe Keohane 569-1661
7) Metco
   Lance Carter 427-1545
8) Mission Hill Planning Commission
   Sari Roboff 442-0050
9) Tenant Policy Council of Boston (represents all public & subsid. housing) Myra McAdoo 542-0620
10) Symphony Tenants Organizing Project
    Cole Harrison 267-4637
11) Ecumenical Social Action Committee
    Betty Rossen 542-2555
12) Southwest Corrider Coalition
    Dan Richardson 427-0035
13) Association of Job Developers
    Ricardo Cabezas 427-7175

14) Greater Roxbury Development Corporation
Richard Walker 445-7175
15) Third World Jobs Clearinghouse
Michael Warren 266-8570
16) United South End Settlement House
Ken Brown 536-8610
17) Hyde Square Neighborhood People
Tom Maher 524-4028
18) Roxbury YMCA
Jackie Cooper 427-5300
19) Recruitment and Training Program
Azell Martin 427-4800
20) Roxbury Tenants of Harvard
Theresa Parks 232-4306
21) Tenant Action Group
Doug Stickell 524-3541
22) Friends and Families of Prisoners
John McGrath 265-8455
23) SEPAC
Barry Brodsky 262-4318
24) Boston Community Schools
Tom Gallagher 542-5351
25) Jamaica Plain Caucus (SWCC)
Edwina Cloherty 427-0035
26) Task Force on Construction
David Lee 536-8610
27) Roxbury Crossing Welfare Advisory Board
John Kenney 442-4800
28) SNAP
Millie Malone 267-7400
29) J.P. APAC
Dennis Wright 522-4250
30) Low Income Planning Aid
Mike Kane 426-4363

31) Cleveland-Marshall Community School
Chris Navin 825-2914
32) Allston/Brighton CPPAX
Laura Ross 783-3972
33) Columbia Point Alcoholism Program
Sylvia Govan 282-2210
34) Roxbury/Mattapan, N. Dorchester Fair Share
Richard Bilel 266-7505
35) Kennedy Center — Charlestown
John Gardiner 241-8866
36) Dennison House — Dorchester
Art Stanley 288-1200
37) Hancock Street Welfare Advisory Board
Geraldine Dunne 282-3970
38) Alianza Hispana
Pedro Gonzales [number not supplied]
39) District 3 Community Council
Rev. Paul Schwenzfeier 298-0577
40) Church St. Welfare Advisory Board
Mary Lou Kaufman 445-6655
41) Dorchester House
Jim Hooley 288-3230
42) Oficina Hispana
Pablo Calderone 522-8917

[Certificate of Service Omitted.]

SUFFOLK, SS. SUPREME JUDICIAL COURT
C.A. No. 80-115

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, ET AL.)
)
V.)
)
KEVIN H. WHITE, MAYOR, ET AL.)

AFFIDAVIT OF THOMAS MAHER

I, Thomas Maher, being duly sworn, do hereby depose and state:

1. I am presently and for the past four years have been the Executive Director of the Boston Jobs Coalition, Inc. (formerly the Boston Jobs Coalition).

2. The Boston Jobs Coalition, Inc. (hereinafter "the BJC") is a coalition of approximately 42 community, labor, and minority organizations, and hundreds of individuals. One of the BJC's primary goals has always been to press government, labor, and construction industry officials to make more construction jobs available to minority workers, women workers, and Boston residents.

3. I and other representatives of the BJC Policy Board, including our counsel, met with Mayor Kevin White, Vic-Mayor Edward Sullivan, and numerous representatives of different city agencies over a three year period, culminating in the promulgation of the Workforce Executive Order in September, 1979, in an effort first to convince the City of Boston to endorse the policy contained in said Order, and secondly to negotiate and

draft the specific language of the Order and the contract provisions to implement it.

4. Representatives of both the construction industry and of its unions were invited to participate in said negotiations but declined to do so.

5. It is certain that without the initiative, pressure, and work of the BJC that said Order would not have been promulgated.

6. The BJC is a member of the Liaison Committee established to monitor compliance with said Order and the contract provisions. Since the promulgation of said Order in September, 1979, representatives of the BJC have attended all or most of the meetings of said committee and have worked actively to see that said Order is implemented. The BJC is specifically designated as a referral agency for Boston residents in said contract provisions.

Signed under the penalties of perjury.

December 2, 1980 /s/ Thomas Maher

Thomas Maher

Opposition

Office - Supreme Court, U.S.
FILED
DEC 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-1003.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,
PETITIONERS,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,
RESPONDENTS.

Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

PAUL J. KINGSTON,
PAUL V. MULKERN, JR.,
KINGSTON & GARRETT,
One McKinley Square,
Boston, Massachusetts 02109.
(617) 367-5050
Counsel for Respondents

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Questions Presented.

May the City of Boston impose a residents' preference quota upon private contractors for the expressed economic purpose of alleviating unemployment:

1. Where the quota applies to private contractors regardless of whether they are involved in public construction projects or private construction projects entirely unsupported by City funds?

2. Where the effects of the quota preclude certain out-of-state contractors from doing business with the City and preclude certain out-of-state employees from employment?

3. Where there is no showing of the unavailability of non-discriminatory alternatives to such a quota adequate to preserve the local interests at stake?

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Table of Authorities Cited.

CASES.

American Yearbook Co. v. Askew, 409 U.S. 904 (1972), aff'g. 339 F. Supp. 719 (M.D. Fla. 1972)	3, 4n, 9, 9n
Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935)	13, 14n
Berg v. City of Minneapolis, 274 Minn. 277, 143 N.W.2d 200 (1966)	10
Colgate v. Harvey, 296 U.S. 404 (1935)	12n
Construction & General Laborers Union, Local 536 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (1965)	10
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Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 17, 18

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) 4, 9

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 11, 12, 14

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 11, 12, 14

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 3, 7, 8, 8n, 9

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CONSTITUTIONAL PROVISIONS.

United States Constitution

Art. I, § 8, cl. 3 *passim*

Art. IV, § 2 *passim*

MISCELLANEOUS.

L. Tribe, American Constitutional Law, (1978) 13n

North End Post Gazette, November 13, 1981 7n

No. 81-1003.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

PETITIONERS,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

RESPONDENTS.

Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respondents[1] respectfully pray that the above-captioned Petitioners' Petition for a Writ of Certiorari be denied.

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[1] The Respondents in this matter include the above-named parties as well as individual Plaintiffs-Respondents who are listed in Exhibit A to the Complaint. These individual Plaintiffs-Respond-

Opinion Below - Jurisdiction - Constitutional Provision Involved.

The Respondents accept the Petitioners' presentation of the above topics.

Statement of the Case.

The Respondents urge that this Court leave undisturbed the unanimous decision of the Supreme Judicial Court for the Commonwealth of Massachusetts that an Executive Order ("the Order") issued by Boston Mayor Kevin H. White on September 11, 1979 is void. That Order required, in relevant part, that every contractor and sub-contractor employ at least 50 percent (50%) Boston residents on any project which involved any City funds, or any Federal or State funds granted to and expended by the City, or even any Federal funds or loan monies granted to a private developer where the City had applied for the grant or loan in behalf of the developer. In short, the Order was an attempt by the City of Boston to impose a resident hiring quota on all contractors and sub-contractors involved in any construction projects within the geographical limits of the City with which the City had even a tangential connection.

The Massachusetts Supreme Judicial Court in its opinion dated August 28, 1981 struck down the Order as violative of the Commerce Clause. At the same time the court invalidated the relevant portion of a state statute (M.G.L. c. 149, § 26) ("the Statute") upon which the Order was purportedly based.[2] While the court found the Statute violative of the

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ents include many non-Massachusetts residents and several non-Massachusetts "specialty contractors."

[2] See the Preamble to the Order at page App. 19 of the City's Petition. Hereinafter, all references to the Opinion of the Supreme Judicial Court, the Executive Order and the Agreed Statement of

Privileges and Immunities Clause of the United States Constitution (Art. IV, § 2)[3] the court found it unnecessary to rule on the constitutionality of the Order under that clause since "the commerce clause ... presents a clear obstacle to the city's order." The court also found it unnecessary to consider the other arguments raised by the Plaintiffs-Respondents for invalidating the Order.[4]

At the outset of its Commerce Clause analysis of the Order, the court termed the Order undeniably "protectionist" in effect. The court stated further: "there is no doubt that the implementation of the mayor's order will have a significant impact on those firms which engage in specialized areas of construction and employ permanent work crews composed of out-of-state residents."[5] The court indicated, however, that despite its protectionist character the Order might be immune from Commerce Clause review if the City, in applying the Order, was acting as a "market participant" as defined by this Court in its decisions in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *American Yearbook Co. v. Askew*, 409 U.S. 904 (1972), *aff'g.* 339 F. Supp. 719 (M.D. Fla. 1972).

Facts shall be designated by the page number at which they can be found in the Petitioners' Appendix (App.). All references to the text of the City's Petition shall be designated by the abbreviation (Pet.) and the appropriate page number.

[3] The Commonwealth has declined to contest the finding of the Supreme Judicial Court that the Statute is unconstitutional. It is interesting that the Commonwealth is content with the state court's ruling with respect to the Statute but that the City, whose Order was expressly predicated on the Statute, sees fit to make a quixotic challenge even without the horse it had been relying on.

[4] The court noted at footnote 12 to its opinion:

> "Conceivably, questions concerning the mayoral order could be disposed of on other grounds, but the resolution we reach is intimately related to the questions necessarily discussed in considering G.L. c. 149, § 26."

[5] App. 14.

Relying largely upon the non-municipal origins of the funds involved in many of the projects to which the Order was being applied, the court held that the market participant exemption did not apply. Noting the fact that a significant percentage of the projects affected by the Order involved various types of Federal rather than municipal funding the court stated: "it is inaccurate to describe the preference as a mere use of city-raised funds to further local interests."[6] Relying upon that fact the court stated further: "it is doubtful that the city is acting in its proprietary capacity in all the activities affected by the executive order."[7]

In contrasting the purported local benefits flowing from the Order with the availability of nondiscriminatory alternatives the court noted that like the Alaska residents' preference statute struck down by this Court in *Hicklin v. Orbeck*, 437 U.S. 518 (1978) the Order "sweeps far wider than merely favoring unemployed or underemployed local residents. . . . The executive order before us establishes a strict numerical requirement which is not at all targeted to the legitimate interests which the city has asserted."[8] Finally, the court also distinguished the so-called municipal hiring cases, e.g. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976), stating they "are quite different since they affect the permanent domicile of employees rather than discouraging the interstate activities of construction firms "[9]

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[6] App. 15.

[7] App. 15. This is also consistent with the court's statement at App. 13 that, in purporting to extend the City's "market power" beyond the party with which it was in privity of contract to any number of sub-contractors of the original contractor, the City was going beyond the preference for contracting with resident businesses upheld by this court in *American Yearbook, supra.*

[8] App. 15.

[9] App. 15.

Argument.

I. The Executive Order Is Not Entitled To Market Participant Immunity From Commerce Clause Review Inasmuch As It Impacts Substantially On Private Construction Projects As Distinguished From Public Works Projects.

At the heart of the City's Petition lies a blatant mischaracterization of the scope of the challenged Order as well as an apparent misunderstanding of the basis for the Massachusetts Supreme Judicial Court's opinion below. The mischaracterization involves the City's attempt to portray the scope of the Order as encompassing only city-funded "public works projects." The "misunderstanding" involves the City's contention that the Supreme Judicial Court invalidated the Order *because* it pertained to the conduct of what the City described as "traditionally governmental" actions.[10]

In its Petition the City has repeatedly contended that the Order "was addressed specifically to 'public works projects' —that is, to the building, improvement, and repair of the City's public parks, roads, and playgrounds, its public schools and little city halls."[11] Yet the record reveals that the Order was *not* "addressed specifically to public works projects." Indeed, nearly two-thirds of the construction activity to which it was applied in 1980 was private construction.[12] The record reveals that of the $54,421,000 worth of construction to which the order was applicable approximately $34,000,000[13] represented private projects involving Urban Development Action Grants.[14] Moreover, an undetermined portion of the remaining $20 million of construction activity applied to an

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[10] Pet. 22.
[11] Pet. 8. See, also, pp. 4, 9, 20, 23.
[12] App. 42, ¶ 18(b).
[13] *Id.*
[14] 42 U.S.C. § 5318.

undetermined combination of public and private construction funded by Community Development Block Grants pursuant to 42 U.S.C. § 5301 *et seq.*, Economic Development Administration Grants to private developers pursuant to 42 U.S.C. § 3131, *et seq.* and other grants pursuant to unidentified state grant programs.

Urban Development Action Grants (UDAG), for example, involve grants made by the Federal Government (the Department of Housing and Urban Development) for *private* development projects *through* the City, which acts as an applicant-intermediary.[15] These grants are intended to stimulate *private* development in the City which would not be economically feasible without some form of assistance to the *private* developer. The record reveals that the City has conditioned its willingness to apply for a UDAG grant for a particular development project upon the *private* developer's agreement to enforce the Order on his entire project.[16] Yet such a project will often involve no local funds at all. In light of the fact that at least two-thirds of the dollar value of projects to which the Executive Order was applied in 1980 were *private* development projects it is misleading for the City to attempt to portray the Order as a measure "addressed specifically to public works projects."[17]

It is not, however, surprising that the City has invoked this strategem. For the City must realize the futility of arguing that it is acting as a "market participant" when it forces *private* developers to apply the quota to their *private* projects.[18]

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[15] 42 U.S.C. § 5318, 24 C.F.R. § 570.450-462.

[16] App. 44, ¶ 19(c).

[17] Pet. 8.

[18] In a recent press release announcing the intention of the City to appeal the ruling of the Supreme Judicial Court in this case, Boston Mayor Kevin White explicitly acknowledged that the scope of the Order was intended to cover *private* construction:

The City's apparent "misunderstanding" of the rationale of the Supreme Judicial Court's decision is closely related to the City's mischaracterization of the scope of the Order. The City has argued in its Petition that the Supreme Judicial Court invalidated the Order *because* the Order pertained to the City's conduct of the "traditionally governmental" actions of public works construction.[19] The fact is that the Supreme Judicial Court found the Order ineligible for "market participant" immunity from Commerce Clause review precisely because the Order was *not* limited to traditional public works projects. The Supreme Judicial Court was very clear in stating that "it is inaccurate to describe the preference as a mere use of city-raised funds . . . [T]he presence or absence of substantial funds from nonlocal sources is at the very least an important factor . . ."[20] in determining whether the *Reeves* market participant exemption is applicable. In short, in applying the Executive Order to projects involving Federal grant programs the City was acting as a "market regulator" rather than as a "market participant."[21]

"As I said in my fourth term inaugural speech in January of 1980, the wealth being generated by Boston in its unprecedented development boom should be shared by people in our neighborhoods. And the best way of funnelling this wealth into the neighborhoods is through jobs being generated by Boston's *dynamic, private-sector construction* activity." North End Post Gazette, November 13, 1981, p. 6 (emphasis added).

[19] Pet. 22.

[20] App. 15.

[21] The City laments the "Catch-22" results of the Massachusetts Supreme Judicial Court's ruling. The "Catch-22" results are the City's creation. That is, the City asserts its Order applies only to public works projects and thus is aggrieved that it is deprived of "market participant" immunity. However, because the Order also applies to private construction projects not City funded, it obviously cannot be considered a "market participant."

The immunity from Commerce Clause review of action taken by the state as a "market participant" is based on what this Court termed in *Reeves*: "the ability of the States themselves to operate freely in the free market" just like any other market participant.[22] Certainly, it could be contended that the City would be acting as a "market participant" if it enacted an ordinance pertaining solely to traditional public works projects financed entirely by municipal funds requiring that preferences in bidding be given to City-based construction firms.[23] But when the City forces the Order on private developers engaged in private construction projects it cannot be said to be participating in the free market as a buyer or seller of goods and services. Rather, it is acting to regulate the conduct of the actual market participants—the developer and his contractors and their sub-contractors.

In addition to its applications to private development projects receiving UDAG grants, the Order has also been applied to public projects financed in whole or in part by Federal or State monies. The attempt of the City to characterize itself as a market participant in these circumstances also breaks down. For the market participant analogy implies that the governmental entity under review is acting like any other buyer or seller in the free market. But it is hard to believe that other marketplace participants find themselves with the responsibility for simply spending monies which have been provided by others. The true marketplace participant earns the monies that it expends.

Of course, it can be contended as did the Respondents in their brief below, that the City acts as a market regulator even when it applies the Order to a City-funded construction

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[22] 447 U.S. at 437.

[23] Even in such a case, the Respondents would contend that public construction is one of the exceptions, hypothesized by the Court in *Reeves*, to marketplace participant immunity. See *Reeves*, *supra*, at 447 U.S. 440 n.14.

project. As the Supreme Judicial Court pointed out in its opinion, in neither *American Yearbook*, nor *Alexandria Scrap*, nor *Reeves* was "the use of the State's market power extended beyond granting an initial contract or a first sale."[24] In contrast, the Order requires a private contractor to impose the Order's quota upon his private sub-contractors who are not in privity with the City.[25]

In any event, whatever arguments may be available in support of a residents' preference limited to City-funded projects, the occasion for review of such a preference is most inappropriate in this case because of the clear overbreadth of the scope of the Order.

The City has also contended that the Supreme Judicial Court was in error when it distinguished the municipal hiring preference cases, e.g. *McCarthy v. Philadelphia Civil Service Commission, supra*, from the instant case. In fact, the Supreme Judicial Court properly reasoned that those cases, which upheld the validity of provisions requiring that municipal employees maintain their residence within the employing municipality, "are quite different since they affect

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[24] App. 13. Also, unlike the cited cases, the Order requires even the party in privity of contract with the City to accept a prospective obligation. Unlike the Florida statute reviewed in *American Yearbook* which required State entities to buy their books from companies which were domiciled *at the time of the sale* within the State, the Order requires contractors, when they *later* actually work on a project to reshape their work crews to include City residents. Indeed, *American Yearbook* would be more similar to the instant case if the State of Florida required all publishers from which it purchased books to certify that they would remain domiciled in the State for a certain period after the books were sold.

[25] Paragraph B(2) of the City of Boston Supplemental Minority Participation And Resident Preference Section, App. 24, provides:

> "Boston Resident Workforce: The Contractor and its subcontractors shall maintain a not less than 50% ratio of Boston Resident employee manhours to total employee manhours in each trade worked on this contract."

the permanent domicile of employees rather than discouraging the interstate activities of construction firms."[26] Of equal importance is the differing nature of the employment: public versus private. Moreover, the type of public employment for which residents' preferences were upheld in those cases was permanent employment. This is contrasted with the intermittent nature of private construction employment where a worker may be working on a project covered by the Order this week, a factory project in a neighboring community next week, and yet another project in the State of Rhode Island the following week.

The clear distinction between public employment and private construction employment on public projects was acknowledged by the Minnesota Supreme Court in *Berg v. City of Minneapolis*, 274 Minn. 277, 143 N.W.2d 200 (1966) where that court, in holding valid a continuing residency requirement for municipal police officers, distinguished its earlier decision in *Construction & General Laborers Union, Local 536 v. City of St. Paul*, 270 Minn. 427, 134 N.W.2d 26 (1965) where it had held unconstitutional a St. Paul ordinance requiring that all contractors who performed work for the City employ on such projects residents of the County in which St. Paul was located. The *Berg* court distinguished the *St. Paul* case by stating:

> "It did not involve government employment but dealt with the subject of people engaged in construction and general labor for contractors doing work on a city project. Such work does not involve public service of a kind which is considered permanent, is not integral to the welfare of the community nor a public service relied upon by citizens of the community in their everyday life." 143 N.W.2d at 203.

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[26] App. 15.

II. The Executive Order Cannot Survive Traditional Commerce Clause Analysis.

Once the Supreme Judicial Court satisfied itself that the City was not acting as a market participant in some or all of the activities covered by the Order, its next step was to analyze the Order pursuant to the Commerce Clause tests enunciated by this Court.

As evidenced by the Supreme Judicial Court's citation of *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) and its quotation from that case, the Supreme Judicial Court considered the order to be "protectionist" legislation subject to the "virtually *per se* rule of invalidity" articulated therein.[27] That conclusion is supported by the facial discrimination against non-Boston residents contained in the Order itself, and the stipulation by the parties that such discrimination would necessarily result in the discouragement of out-of-state specialty contractors from bidding on any projects to which the Order is applied, "resulting in higher costs of public construction because of fewer competitive bids."[28]

While the Supreme Judicial Court did not specifically cite any of this Court's cases enunciating and applying the intermediate standard of Commerce Clause review, e.g. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the court applied the balancing test implicit in that standard of review. For the court observed that the Order was, like the residents' preference statute struck down by the Court in *Hicklin, supra*, "a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents."[29] Despite what it characterized as "legitimate interests" asserted in justification of the Order by the City, the court held that the Order's "strict numerical requirements"

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[27] App. 14.
[28] App. 37, ¶ 9(j); App. 41, ¶ 15(a).
[29] App. 15.

were not "at all targeted" to the asserted interests.[30]

The City has argued in its Petition that in striking down the Order the Supreme Judicial Court engaged in "an abstract exercise in absolutes" and "defied"[31] the balancing test enunciated by this Court in *Pike v. Bruce Church, Inc.* In so arguing, however, the City ignored the more stringent standard of review, cited by the Supreme Judicial Court in its decision, which has been employed by this Court where a state regulation involves economic protectionism. *Philadelphia v. New Jersey, supra.* The City also ignored the court's obvious balancing of the Order's burden on interstate commerce versus the purported municipal interests propounded by the City.

Like the statute challenged in *Philadelphia,* the Order creates a "patent discrimination against interstate trade."[32] This discrimination is created by the operation of the residents' quota on out-of-state specialty contractors who maintain regular work crews.[33] The Order would require such a contractor who actually bid on a covered project to lay off half of his normal work crew and replace those individuals with Boston residents.

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[30] App. 15.

[31] Pet. 12.

[32] 437 U.S. at 624.

[33] It is notable that not only the out-of-state construction firms but also the out-of-state construction workers are entitled to the protections of the Commerce Clause. As stated by Justice Stone in *Colgate v. Harvey,* 296 U.S. 404 (1935):

> "This Court has many times pointed out that movements of persons across state boundaries are a part of interstate commerce subject to the regulations and entitled to the protection of the national government under the commerce clause."

See, also, *Edwards v. California,* 314 U.S. 160 (1941); and *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525 (1949). The discrimination against these out-of-state workers is even more patent than the discrimination against the firms by which they are customarily employed.

The New York Court of Appeals, in striking down a similar residents' preference statute, recognized that complying with such a requirement would seriously disadvantage an out-of-state contractor since it would deprive him of "the readier co-ordination between experienced supervisors and a team of tried employees who customarily work together." *Salla v. County of Monroe*, 48 N.Y.2d 514, 524, 399 N.E.2d 909, 914, 423 N.Y.S.2d 878, 882-883 (1980). That court further acknowledged the "disadvantages of additional expense, inconvenience and organizational disruption" to such an out-of-state contractor who was forced to lay off his regular crew and hire unknown persons in their places. *Id.*

Of special significance in analyzing the "protectionist" nature of the Order is its avowed economic purpose of reducing unemployment of Boston residents.[34]

In the past, this Court has examined the nature of the regulation in question and has consistently invalidated those regulations which are designed to promote or protect parochial local economic interests as distinguished from those involving health and safety.[35]

In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935), this Court flatly rejected a New York "protectionist" statute prohibiting the sale in New York of milk bought outside New York unless the milk had been purchased at a given price level. The statute precluded the out-of-state plaintiff milk dealer from selling his milk in New York because he had purchased it at a lower price in Vermont. Justice Cardozo viewed the Commerce Clause as "less parochial in range. It was framed upon the theory that the peoples of the several states

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[34] One writer expresses the view that this Court's Commerce Clause decisions reflect a "high judicial tolerance" for health and environmental regulations as distinct from economic regulations. L. Tribe, *American Constitutional Law*, sec. 6-6, p. 329 (1978).

[35] *H.P. Hood & Sons, supra*, 336 U.S. at 532.

must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[36] Of more particular relevance was Justice Cardozo's plain proscription of a state's "economic barrier against competition with the products of another state or *the labor of its residents.*"[37] The Order which the Supreme Judicial Court found violative of the Commerce Clause was exactly that kind of an economic barrier.

The Supreme Judicial Court correctly held that a residents' quota such as contained in the Order is "protectionist" legislation subject to the "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey, supra.* However, even under the less stringent standard of review, for provisions placing only a "burden" on interstate commerce, articulated by the Court in *Pike v. Bruce Church, Inc., supra,* the Order must fall. For it is clear that under the *Pike* test:

> "... the burden falls *on the State* to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333, 353 (1976) (emphasis added).

While the record indicates a number of, admittedly, "legitimate"[38] purposes and effects of the Order, they all focus on and are outgrowths of, the reduction of unemployment within the City.[39] The defect is that the City has adopted a means of reducing its own unemployment which all parties below agreed has, *inter alia,* the side effect of causing the unemployment of non-residents of Massachusetts who

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[36] *Baldwin v. G.A.F. Seelig,* 294 U.S. at 523.

[37] *Id.* at 527 (emphasis added).

[38] App. 15.

[39] It is notable in this respect that the Executive Order, itself, cites only the reduction of unemployment as its purpose. App. 19.

"otherwise would have been employed on projects to which the Executive Order has been applied."[40] In short, in an attempt to reduce its own unemployment, the City is exporting unemployment to other localities.[41]

Given what this Court has termed the "mutually reinforcing relationship between the Privileges and Immunities Clause of Article IV and the Commerce Clause," *Hicklin, supra,* 437 U.S. at 531, it is appropriate to consider the Court's analysis in that case of the State of Alaska's justification (i.e. reduction of unemployment) for a similar residents' preference statute.

In holding that statute unconstitutional, the Court focused on the breadth of the employment preference and the availability of less discriminatory alternatives for addressing the unemployment which the statute was purportedly enacted to reduce. Thus, the Court emphasized that under the challenged statute "a highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job training program."[42] This same overbreadth defect appears in the Order. A highly skilled and educated tradesman from one of the af-

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[40] App. 37, ¶ 9(i).

[41] The parties below agreed that the Order would inevitably result in increased costs for those contractors who actually perform work covered by the Order. App. 37, ¶ 9(k). The parties also agreed that the Order might have several additional negative effects including: the fostering of antagonism toward the City on the part of non-resident construction workers who were discriminated against; the proliferation of similar preferences in surrounding communities; a bitterness on the part of non-residents who did work on such projects resulting in increased job disruption and grievances; and a reduced commitment on the part of such non-resident workers towards the quality of work on such projects. App. 38, ¶ 9(b),(d).

[42] *Hicklin v. Orbeck,* 437 U.S. at 527.

fluent sections of the City is entitled under the Order to the same preference as an unskilled, habitually unemployed resident of a disadvantaged section of the City.

Of special relevance to Commerce Clause inquiry, the Court in *Hicklin* identified certain less discriminatory alternatives to an "across-the-board"[43] residents' preference. Thus, the Court indicated that "a preference to unemployed residents or to residents enrolled in job training programs"[44] might possibly be constitutional. Certainly, these less discriminatory alternatives were available to the City when it implemented the Order. Indeed, the City has, itself, admitted in its Petition: "That there may be 'alternative ways of solving' the urban problems confronted here, . . . cannot be gainsaid."[45]

It is predictable that if residence preferences are given judicial sanction, such preferences will be adopted by states and communities nationwide. The type of fencebuilding which would result is totally incompatible with the efficient operation of the construction industry. A contractor would be forced to either refrain from bidding on covered projects or bid on the projects and lay-off and rehire men each time he entered a new state or municipality. Clearly, this would result in monumental disruptions of the business operations of construction contractors and the working lives of the construction workers normally employed by them. The disruptive nature of such preferences is dramatically increased when they are applied to the myriad of major private projects receiving some type of governmental assistance such as UDAG grants.

Nor does the fact that certain non-Boston, Massachusetts firms are also disadvantaged by the Order render the Order

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[43] *Id.* at 528.
[44] *Id.*
[45] Pet. 18.

any less discriminatory toward out-of-state firms. It is clear from this Court's decision in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) that it is "immaterial" for purposes of Commerce Clause review that some intra-state concerns are also subject to the same discriminatory treatment as firms from out-of-state. 340 U.S. at 354, fn. 4. The critical factor in finding discrimination in *Dean Milk*[46] and in the instant case is that in both instances there are local concerns which are the beneficiaries of the discrimination and who are, thus, "protected" from competition, and there are concerns from without the state who are disadvantaged by the discrimination. The fact that the local firms are also protected from competition from firms within the state but geographically distant from the municipality in question is "immaterial" to Commerce Clause review.

The City has also contended that this case is controlled by this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The City's reliance on *Exxon* is misplaced. As this Court observed in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the critical factor in sustaining the challenged statute in *Exxon* was the absence of discrimination on the basis of domicile between similarly situated entities. Thus, in *Exxon* there was no discrimination between interstate and local producer-refiners.

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[46] The City has attempted to distinguish *Dean Milk* from the instant case by contending that the challenged ordinance in *Dean Milk* did not effect any Wisconsin concerns outside the favored area but, rather, "effectively served to bar only Dean Milk Co., a large Illinois firm." Pet. 16, fn. 14. The City is distinguishing by means of mischaracterization. Neither the opinion of this Court in that case nor the dissent indicates that Dean Milk was the only concern disadvantaged by the challenged ordinance. To the contrary, footnote 4 to the Court's Opinion would seem to imply that there *were* Wisconsin concerns located outside the protected five-mile area who were disadvantaged by the ordinance. 349 U.S. 354 at fn. 4.

All producer-refiners regardless of their state of domicile were prohibited from owning service stations in Maryland. In comparison, in *Lewis*, as in the instant case, the challenged provisions "discriminate *among* affected business entities according to the extent of their contacts within the local economy." 447 U.S. at 42 (emphasis the Court's). The challenged statute in *Lewis* conditioned the ability of a class of similarly-situated entities to do business within the State of Florida upon whether or not an entity was domiciled locally. Similarly, the Order effectively prevents the typical out-of-state specialty contractor from bidding on a covered project purely because of the residence of his regular workforce.[47]

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[47] In an attempt to bring this case within the holding of *Exxon*, the City has contended in its Petition (at pp. 7, 13-14) that the Order may have no effect upon interstate commerce since "the record contains no indication that any out-of-state contractors deterred by the Order would not simply be replaced by other out-of-state businesses." This argument is disingenuous, at best, since there is absolutely no reason why one out-of-state specialty contractor would be more likely than another to split-up his regular crew and hire unknown and untried men.

While the Agreed Statement of Facts did not specifically address every hypothetical situation that could conceivably be raised, it was not the parties' intention that it do so nor would it have been physically possible to produce a document that was so all-inclusive. In its Petition, the City has described as unresolved many factual issues which, given the general statements of fact in the Agreed Statement of Facts, simply cannot be contested. For example, at footnote 35 at page 7 of its Petition, the City contends: "Whether *any* out-of-state firms had actually been or would actually be injured by the challenged order is unclear." Such a statement is clearly contrary to the basic factual agreements of the Agreed Statement of Facts.

More generally, the Agreed Statement of Facts had the purpose of bringing various issues before the courts for review without what would likely have been a protracted evidentiary hearing. After agreeing to this general vehicle for review of the Order, it is inappropriate for the City to now argue that the Agreed Statement of Facts does not specifically address every hypothetical situation.

Conclusion.

This Court has frequently indicated that the purpose of the Commerce Clause was to avoid "tendencies toward economic Balkanization of the states." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The Executive Order is but a late example of those isolationist tendencies which the Framers of that Clause sought to limit. The Executive Order would build a fence around the City of Boston which would prevent construction workers, who would otherwise be working on covered projects, from working in the City. It would also preclude many specialty contractors from even bidding on covered projects. Yet, as the Framers realized, this type of economic protectionism is self-defeating since it inevitably leads to a proliferation of similar exclusionary regulations and, as the parties below agreed, results in higher costs for the work actually performed.

If the City had limited the scope of the Order merely to the small number of public works projects funded entirely from local sources, the Order may have survived Commerce Clause scrutiny due to what would have been its *de minimis* impact on interstate commerce and due to the proprietary nature of the covered actions. But the City attempted to apply it to projects funded from other governmental sources and, most objectionably, to major private projects. It was this "overreaching" aspect of the Order that the Supreme Judicial

Court focused upon in striking it down. In doing so, the court acted in absolute conformity with established precedents of this Court. The Court therefore should deny certiorari.

Respectfully submitted,

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No. 81-1003.

In the Supreme Court of the United States

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Legislative History of Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, [1981] U.S. Code Cong. & Ad. News No. 7A at 542 5n

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Petitioners Kevin H. White, *et al.*, file this brief under S.Ct.R. 22.5 in reply to the Brief of Respondents Massachusetts Council of Construction Employers, Inc., *et al.*, in Opposition to Petition for Certiorari (Opp.), filed in this Court on December 30, 1981.

Argument.

Respondents accuse petitioners of "blatant mischaracterization," Opp. at 5, and "stratagem," *id.* at 6, but manage only to strengthen the case for granting certiorari and reversing the judgment below.

I. Immunity under *Reeves, Inc.* v. *Stake*[1] and *Hughes* v. *Alexandria Scrap Corp.*[2]

To take this case outside the reach of *Reeves* and *Alexandria Scrap*, respondents distort the record, misstate the terms of the Executive Order at issue, and misrepresent the decision below — all in order to depict this as a case involving *discriminatory regulation* of *private construction*, rather than a case involving a city's entirely reasonable (and indeed flexible) *contracting preference* for firms hiring local residents in *city-sponsored public works projects*. Like the thirteenth chime of a clock, what resondents say in their latest submission decisively discredits all they have thus far argued against the City in this litigation.

1. Respondents state that, "[a]t the outset of its Commerce Clause analysis of the Order, the court [below] termed the Order undeniably 'protectionist' in effect." Opp. at 3. *See also* Opp. at 11, 14. The court said nothing of the sort.[3]

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[1] 447 U.S. 429 (1980).

[2] 426 U.S. 794 (1976).

[3] What the court actually *said* was this:

> "Neither party would, we think, seriously dispute the proposition that an attempt by the city to apply the regulations contained in the order to *all* private construction *would* fall to . . . a challenge [under the

2. Respondents next assert that "the Supreme Judicial Court found the Order ineligible for 'market participant' immunity from Commerce Clause review precisely because the Order was *not* limited to traditional public works projects." Opp. at 7 (emphasis in original). The Supreme Judicial Court found no such thing.[4]

> Commerce Clause.] Such economic protectionism triggers a 'virtually *per se* rule of invalidity.'"

App. A14 (emphasis added). The court was, of course, *contrasting* its hypothesized "attempt by the city" with the *actual* terms of the Order, as to which the court conceded that

> "neither on its face, nor in fact, can the order be said to aim solely, or chiefly, at out-of-State residents."

App. A13. *At no point* did the court below attempt, as respondents do here, to characterize the Executive Order in this case as a "protectionist" *regulation* of most or all *private* construction in Boston.

[4] To the degree the court below sought to distinguish this Executive Order from the state or city actions upheld in such cases as *Reeves*, it did so *exclusively* on the grounds: (a) that this Order's "implementation . . . will have a significant impact on those firms which engage in specialized areas of construction and employ permanent work crews composed of out-of-State residents," App. A14; (b) that "a significant percentage of the funds affected by the order [in this case] are received from Federal sources," *id.* at A15; and (c) that this Order is linked to "a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents." *Id.* (The statue in question, Mass. G.L. c. 149, § 26, was indeed one of the sources for the City's authority to enact the Order, *see* App. A19, but the statute was struck down under the Privileges and Immunities Clause of Article IV, § 2, because of its facial discrimination against out-of-staters, *see* App. A9-A13, an infirmity obviously absent from the Executive Order itself. *See* App. A13-A14. The state's decision not to contest the statute's invalidation is thus not particularly surprising, *but see* Opp. at 3 n.3, and has no legal bearing on this case.)

The court's concluding observation — that "it is doubtful that the city is acting in its proprietary capacity in all the activities affected by the executive order," App. A15 — neither says nor suggests that the court's concern was with the Order's alleged application to developments other than "traditional public works projects." *See, contra*, Opp. at 7. On the contrary, it is precise-

3. Respondents finally proclaim that, whatever the court below might have found or held, the Order at issue in this case in fact covers "any project which involve[s] . . . any Federal funds or loan moneys granted to a private developer where the City ha[s] applied for the grant or loan in behalf of the developer." Opp. at 2. That is simply untrue.

a. *First*:

After reciting the City's specific concern with "money derived from federal, state and city *taxes paid by Boston residents*," App. A19 (emphasis added),[5] and expended "upon *public works projects* in the City," *id.* (emphasis added), the Order unambiguously limits its own reach to:

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ly the Order's application *to* such traditionally governmental (and, in this sense, "non-proprietary") undertakings that the court below appears to have deemed problematic — and that respondents, too, insist on treating as "one of the exceptions, hypothesized by the Court in *Reeves*, to marketplace participant immunity." Opp. at 8 n.23. Indeed, the state statute to which respondents point as the principal source of the authority, under Massachusetts law, for the Executive Order in this case, *see* Opp. at 2-3 & nn. 2, 3, is described by the court below as dealing only with "public construction employment." App. A12 n.18. *See also* page 6 *infra*.

There is thus no mystery at all about what the court below held: it struck down as unconstitutional *per se*, on its face and in its entirety, the City of Boston's contracting preference for firms hiring at least fifty per-cent local residents on *City-sponsored public works projects*. Not a word of the court's judgment or opinion even hints that the Order was being invalidated *only as applied to*, or *because of* any supposed *inclusion* of, "private" projects — projects in which the City serves as a mere conduit for outside tax moneys directed to private developers.

[5] Without ever addressing petitioners' demonstration that the funding source is immaterial to the constitutional issues in this case, *see* Pet. at 20-21 n.28, respondents repeatedly stress the funneling of some of these taxes through state and federal revenue-collection and revenue-disbursement agencies. As the court below expressly recognized, however, "[t]he goals of . . . the executive order are to lessen unemployment . . . in the city and to ensure that the expenditure of *local funds* result in *maximum benefits to the locality where the moneys are raised*." App. A7 (emphasis added).

> construction project[s] funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract . . . .

App. A20. It is a bold fantasy indeed to suggest that these words might be read to cover profitable ventures by private developers on whose behalf the City merely applies for a state or federal grant or loan "as an applicant-intermediary." Opp. at 6 (footnote omitted). We repeat: under the Order's *express terms*, the Order has *no application at all* unless the City itself: (i) "*expends or administers*" the funds in question, *and* (ii) "is *a signatory to the construction contract itself*."[6]

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[6] Whatever might have been the case in 1980 (*see* Opp. at 5, referring to Agreed Statement of Facts ¶ 18(b), App. A42), the City is not even a contract-signatory on any but perhaps a negligible fraction of projects being funded in Boston, in 1981 or beyond, through the Urban Development Action Grants (UDAGs) to which respondents repeatedly refer. *See* Opp. at 5-6. And, in any event, nothing in the record or in the decision below suggest that *any* UDAG-funded project (or any project funded by any other state or federal program mentioned by respondents) that is actually subject to the Order could properly be described as "private."

Under the Housing and Urban Development Act of 1974, 42 U.S.C. § 5301 *et seq.*, for example, Congress authorized the Secretary of Housing and Urban Development "to make urban development grants to severely distressed cities and urban counties to help alleviate physical and economic deterioration." *Id.* § 5318(a). Such UDAG grants "are intended to attract new private investment for neighborhood, commercial or industrial developments that alleviate physical and economic distress." 24 C.F.R. § 570.458(b). The grant program's "primary objective" is that of "revitalizing distressed communities thorugh the creation or retention of jobs and the expansion of tax base." *Legislative History of Omnibus Budget Reconciliation Act of 1981*, P.L. 97-35, [1981] U.S. Code Cong. & Ad. News No. 7A at 542. Thus, all projects under the UDAG program, to the extent that such projects do involve private funds, are essentailly public relief projects, even when the projects themselves might make some use of privately-owned, profit-making ven-

b. *Second*:

Perhaps most decisively, respondents themselves disparagingly treat the Order as "expressly predicated on" Mass. G.L. c. 149, § 26. *See* Opp. at 3 n.3; App. A19. But that state statute, in turn, authorizes residential preferences (and certain other preferences not material here) *only* "in the construction of *public works*." App. A2 n.3 (emphasis added); App. A34-A35. Whether viewed as an exercise of power initially delegated by Mass. G.L. c. 149, § 26, or as an exercise of home-rule authority, or both, the Executive Order neither asserts nor invokes any municipal power beyond that over *public works construction*.

4. There is thus no doubt that, in invalidating the Executive Order, the Massachusetts Supreme Judicial Court did indeed strike down "a central feature of the program for jobs-creation through public works" — and *through public works only* — "on which the City of Boston has chosen to rely in constructing and refurbishing its public schools, playgrounds, parks, roads, and other municipal facilities." Petition at 4 (footnote omitted). Respondents' attempt to stretch the City's public works preference into a policy of *regulating* "*all* contractors and subcontractors involved in *any* construction projects within the geographical limits of the City with which the City ha[s] even a tangential connection," Opp. at 2 (emphasis added), is thus a transparent distortion — creative, perhaps, but hardly convincing.

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tures. Many UDAG projects, however, have little or nothing to do with such profit-making ventures, such as the publicly-owned parking garage, nursing home, and naval yard site improvements included among Boston's 1980 UDAG undertakings. And it bears emphasis that, in any case, UDAG-funded projects no longer constitute a substantial fraction of the undertakings reached by the Executive Order in this case.

II. Application of *Exxon Corp.* v. *Governor of Maryland*[7] and *Pike* v. *Bruce Church, Inc.*[8]

Even if the Executive Order were regarded as "regulating" a substantial amount of purely private activity (in addition to the public works construction that the Order indisputably encompasses), and were for this reason deemed subject to traditional Commerce Clause analysis[9], the decision below would remain hopelessly inconsistent with this Court's holdings under the Commerce Clause.

1. Respondents seek to excuse the total failure of the record herein to establish, or of the court below to find, that the Order caused any *net burden upon*, or any *actual discrimination against*, interstate commerce *as such*.[10] To that end, respondents plead the impossibility of "address[ing] every hypothetical situation" in the stipulation of facts. Opp. at 18 n. 47. But the "situations" posed by petitioners and not addressed by the stipulation, *see* Petition at 12-16, are anything but marginal: they are the pivots on which any Commerce Clause analysis must turn.

2. Nor is there anything in the least "hypothetical" about the fact — conspicuously uncontested by respondents — that

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[7] 437 U.S. 117 (1978).

[8] 397 U.S. 137 (1970).

[9] Even on this hypothesis, the applicability to such Commerce Clause cases as this of facial invalidation for "overbreadth," Opp. at 15, a technique inapplicable even in the context of commercial speech, *see Bates* v. *Arizona State Bar*, 433 U.S. 350, 380-81 (1977), represents an additionally dubious, and probably an insupportable, premise of the decision below — a premise that itself warrants review and reversal of that decision. *Cf.* Petition at 16 & n.18; *see* Part III *infra*.

[10] It bears repeating that, as the state court concluded, "neither *on its face*, nor *in fact*, can the order be said to aim solely, or chiefly, at out-of-State residents." App. A13 (emphasis added).

the *actual data* of record, "which are stipulated to be 'representative,' App. A44, reveal *no reduction whatever* in percentage of out-of-state residents on City-funded projects after the October 15, 1979, effective date of the order," Petition at 13 n.5, and show *not a single firm* actually pressured to "withdraw from the City-funded construction market in Boston rather than undertake the marginal change in staffing that would be required to comply with the order." *Id.*

3. Finally, respondents — like the court below — deny neither the legitimacy nor the reality, *see* Opp. at 14, of most of the justifications petitioners have offered in defense of the City of Boston's preference, whenever feasible, *see* Petition at 3 & n.5; *id.* at 5 & n.20, for public works crews that include at least as many local residents as out-of-town workers. *See* Petition at 17-18. The decision below thus flatly repudiates this Court's view of the Commerce Clause as leaving room for states and localities to adopt policies in pursuit of legitimate ends that, on balance, justify the impediments to commerce that such policies might entail.

III. The State Court's Misuse of Overbreadth Invalidation in Light of *Cabell* v. *Chavez-Salido*.[11]

At the very least, the decision below must be reversed or vacated in light of yesterday's holding by this Court in *Cabell* that a state law which imposes a challenged employment criterion (there, citizenship) for a range of positions *many of which may validly be subjected to that criterion* may not be struck down *on its face* and *in its entirety* at the behest of plaintiffs who do not show that the criterion is invalid *as applied* to the specific positions *they* seek.[12]

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[11] No. 80-990 (U.S. January 12, 1982).

[12] *See* Part III of the *Cabell* opinion.

In the present case, *Cabell*'s limitation on the technique of wholesale invalidation for facial overbreadth, *see also* note 9 *supra*, means that the Executive Order could *at most* be ruled invalid as applied to what respondents call "private projects," *see* Part I *supra*, at the instance of firms or individuals (if there are any) who are demonstrably injured by the City's supposed extension, to such private projects, of its rule that construction crews must be at least fifty percent local whenever feasible.

Given *Cabell*, and given the Executive Order's obvious validity at least as applied to the City-funded public works projects[13] that are the Order's central (if not exclusive) concern, the court below was indisputably "wrong in striking down the [Order] on its face." *Cabell*, Slip Opinion at 9-10.

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[13] *See* Petition at 19-24.

Conclusion.

In the name of the United States Constitution, the decision of the Massachusetts Supreme Judicial Court impermissibly constrains and obstructs urban options for coping, through reasonable local preferences in public works construction, with such pressing problems as local joblessness. The Commerce Clause cannot properly be invoked to support any such extreme result. Accordingly, this Court should grant certiorari and either set the case for plenary briefing and argument or, given the egregiousness of the errors committed by the state court, summarily reverse the decision below.

Respectfully submitted,

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Petitioner's Brief

CORRECTED COPY

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In the Supreme Court of the United States

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

BRIEF OF PETITIONERS

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Questions Presented

Seeking to cope simultaneously with urban deterioration, racial tension, high levels of disproportionately minority inner-city unemployment, and a flow toward the suburbs of the very jobs that best match the skills of the city's most disadvantaged residents, the City of Boston decided to augment its race-specific efforts to improve minority employment opportunities with a race-blind policy of awarding tax-supported public works contracts only to firms willing to hire Boston residents, if available, for at least half the public works jobs on the projects covered by their contract awards with the City.

1. Is such a municipal decision limited by, and judicially reviewable under, the negative implications of the Commerce Clause?

2. If it is, may the City's decision be struck down solely because, whatever its legitimate aims and effects and however minimal its impact upon out-of-state firms and workers both absolutely and in comparison with its in-state impact, that decision might deter several out-of-state companies with permanent construction crews from bidding on the City's public works contracts?

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B. Any contrary conclusion would conflict with this Court's holding in *McCarthy* and would be irreconcileable with *National League of Cities*. 19

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A. This city preference triggers at most a requirement of rational relationship between burdens on the interstate market and legitimate local ends. 22

B. No constitutionally cognizable burdens on the interstate market were found below or revealed by this record. 23

C. Even if the order's interstate consequences could be deemed problematic under the Commerce Clause, the order's legitimate aims and effects would suffice to sustain its validity. 24

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BRIEF OF PETITIONERS

Opinions Below

The opinion of the Supreme Judicial Court, dated August 28, 1981, is reported at [1981] Mass. Adv. Sh. 2039, 425 N.E.2d 346 (1981), and appears in the Appendix to the Petition for Certiorari at A1-A16. That court's final judgment was entered on November 23, 1981, and appears at A17-A18.

Jurisdiction

Respondents commenced this action on March 20, 1980, in the Single Justice Session of the Supreme Judicial Court seeking, *inter alia*, to obtain a declaration of invalidity of an Executive Order, A19-A21, dated September 11, 1979, and effective October 15, 1979. After the parties entered into an Agreed Statement of Facts, A30-A47, the case was reserved and reported by the Single Justice to the Full Court without decision. After argument, that court issued an opinion on August 28, 1981, A1-A16, declaring the Executive Order void under the Commerce Clause. That opinion was embodied in a final judgment on November 23, 1981. A17-A18. This Court granted certiorari on January 25, 1982. 102 S.Ct. 1273. The Court's jurisdiction rests on 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, ARTICLE I, § 8, CL. 3:

"The Congress shall have Power . . . to regulate Commerce . . . among the several States. . . ."

UNITED STATES CONSTITUTION, AMENDMENT X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statement of the Case

Petitioners ("the City")[1] seek review of a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, A1-A18, declaring void an Executive Order ("the order")[2] which confined the City's future public works construction contracts — contracts, in the order's terms, for

> construction project[s] funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract

— to firms filling at least half the positions on such projects with City residents[3] whenever feasible[4] regardless of any such firm's state of incorporation or place of business.

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[1] Petitioners are the Mayor of Boston and the City of Boston, defendants below, and the Boston Jobs Coalition, Inc., defendant-intervenor below. Respondents, plaintiffs below, are the parties identified in the caption and forty-three individuals listed in an Exhibit A appended to the complaint.

[2] The full text of that order appears at A19-A21. A state statute also invalidated in part by the court below, *see* A2 n.3, A9-A13, is not involved in this case, the State not having sought certiorari to review that statute's invalidation.

[3] As the court below noted, "[n]o challenge has been made to those aspects of the order setting out hiring guidelines based on race and sex." A3 n.8.

[4] Paragraph B(5) of the City of Boston Supplemental Minority Participation And Resident Preference Section, A25, provides that contractors and subcontractors "shall be deemed to be in compliance with [the paragraphs dealing with women, minorities, and resident employees] if [they have complied with] Section E, paragraph 6" — containing various disclosure requirements — "and [have] demonstrated to the satisfaction of the Compliance Unit and Liaison Committee that [they have] taken all reasonable steps to so comply with the provisions of this Article."

The relevant facts are not in dispute. As the parties have stipulated,[5] the order had the design and effect of reducing persistent and unusually high levels of inner-city unemployment;[6] providing otherwise unavailable job skills and experience for city residents;[7] increasing the tangible benefits to such residents from local, state, and federal taxes they pay;[8] and reducing absenteeism and tardiness on public construction projects caused by commuting non-resident workers.[9]

The parties further stipulated that, if a trial of fact were permitted, the order might also be shown to reduce local antagonism and neighborhood vandalism against municipal construction sites;[10] to enhance local commitment to the success and quality of the City's projects;[11] and to alleviate tensions

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[5] *See* Agreed Statement of Facts, A30-A47.

[6] A35, A36 (¶¶ 7(a), (b); 9(a) (b)). Boston's unemployment rate has exceeded the New England average throughout most of the 1970-80 period. *See* J.A.5. More than half of Boston's jobs are nonetheless filled by people who do not live in the City. *See* Doolittle, "Jobs and People in Boston," Paper Delivered at Boston Workshop Series of the MIT-Harvard Joint Center for Urban Studies at 2 (Jan. 20, 1982). Especially high inner-city unemployment among Boston's minority and youth populations, *see id.* at ii, 24, 26, is caused in part by a shift of construction and other suitable job opportunities to suburban areas that are particularly inaccessible to those without cars, given the character of public transit in the region. *Id.* at iii, 15. Not even the area's general recovery from the recession of the mid-1970's reversed the trend of a shrinking job market in the construction, manufacturing, and other blue-collar trades most relevant to Boston's resident work force. *See* Doolittle, "Employment in Boston: Past, Present, and Future," Paper Delivered at Boston Workshop Series of the MIT-Harvard Joint Center for Urban Studies at 18 (Dec. 2, 1981). This mismatch between inner-city jobs and less affluent inner-city residents thus represents a persistent and growing feature of the Boston landscape. *See* V. Hirsch, "The Coming Age of the Polynucleated Metropolis," in Small Cities in Transition (H. Bryce, ed. 1977).

[7] A36 (¶ 9(g)).

[8] A35, A36 (¶¶ 7(c), (d); 9(c), (d)).

[9] A36 (¶ 9(f)).

[10] A37 (¶ 10(a)).

[11] A38 (¶ 10(c)).

that are caused by, and may obstruct the progress of, city efforts to overcome past racial discrimination in local construction activities.[12] In particular, although a pre-existing provision of the order (not at issue here) continued to include explicit "hiring guidelines based on race . . . ,"[13] the order's hiring preference for local residents reduced the degree to which racial quotas would have to be relied on to remedy prior discrimination. For, as the parties stipulated, "the effects of the residency aspects of the . . . Order include . . . . [c]orrelation of the ethnic and racial composition of construction workers on affected projects with the ethnic and racial makeup of the City."[14] In short, because minorities comprise a much higher fraction of the population in the city than in the suburbs, requiring the City's contract partners to hire locally *automatically* enhances minority job opportunities without excluding any city dweller because he or she does *not* belong to a racial minority.

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[12] A36, A38 (¶¶ 8, 11).

[13] A3 n.8. Several years prior to the promulgation of the executive order at issue, the City had enacted an executive order limited to affirmative action for minorities on city-sponsored construction projects, in response to the well-documented history of exclusion of minority workers from the construction trades in Massachusetts. *See Associated General Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). More unfortunate than surprising have been the limited if noteworthy successes of such efforts and the racial tensions and resentments to which they are often perceived as contributing. *See* Preface to City of Boston Supplemental Minority Participation and Resident Preference Section at ii-iii (Sept. 15, 1978; Oct. 15, 1979). It was against this background, and with the goal of reducing racial discord by expanding job opportunities for white as well as minority residents, that defendant intervenor Boston Jobs Coalition, Inc., a group of 42 white and minority community, social service, and labor organizations in Boston, successfully negotiated with the City of Boston over a six-year period for the adoption of the order at issue here. *See* A33-34 (¶ 4(a)); Motion of Boston Jobs Coalition, Inc., to Intervene as Defendant, J.A. 7-13.

[14] A36 (¶ 9(e)); A46 (¶ 28).

The state's highest court mentioned only a few of these objectives and effects of the challenged order,[15] treating them all as ultimately irrelevant on the sole ground that the local hiring preference, which the court misdescribed as a "strict numerical requirement,"[16] was not confined to jobless residents and was, on this account, "not at all targeted" to the interests advanced in its defense.[17] In explaining why it had subjected the order's hiring preference to such obviously severe and indeed predictably fatal constitutional scrutiny, the court below focused not on the order's consequences for *employees* — who are subject to no disadvantage under the order if they wish to change their domicile to Boston, and who, if they decide to stay put, are treated the same way regardless of their *state* of residence[18] — but on the order's supposed implications for the activities of certain *employers* in "interstate commerce."[19]

Thus, inasmuch as "neither on its face, nor in fact, can the order be said to aim solely, or chiefly, at out-of-State residents,"[20] the court below found no obstacle to the order in the Interstate Privileges and Immunities Clause of Article IV, § 2.[21] The court nonetheless held the order void under the Commerce Clause.[22] While acknowledging that the Commerce Clause is ordinarily inapplicable to a state's or munici-

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[15] For example, that court made no reference at all to the stipulated upgrading of job skills or reduction of commuter tardiness and absenteeism, the encouragement of local involvement in neighborhood projects, or the crucial reduction of the need to rely on explicit racial quotas.

[16] A15. *See* note 4 *supra*.

[17] A15.

[18] *Id.* The court thus contrasted this order with measures likely to "affect the permanent domicile of employees." *Id.*

[19] *Id.*

[20] A13. *See also* note 32 *infra*.

[21] A14.

[22] *Id.*

pality's actions "as a market participant,"[23] under such decisions as *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), and *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the court below held this commerce clause immunity to be unavailable here.

Without ever explaining why these factors should even be *relevant* to the existence of commerce clause immunity, the court simply observed that the order at issue would adversely affect the interstate activities of some out-of-state construction firms;[24] that it would affect some projects funded in part by non-local revenue sources;[25] that its preferential treatment would not be confined to unemployed or underemployed residents;[26] and that it might affect some "activities" in which "the city is [not] acting in its proprietary capacity . . . ."[27]

As to this Court's explicit holding that cities are constitutionally free to prefer their own residents as municipal employees, *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976), the court below proposed a distinction between persons dealing with a city *directly* and those dealing with it *through a private firm* as the direct employer: to protect such firms, cities must confine residential preferences to "direct hiring."[28] Any city that finds the option of running its own public works construction projects without private-sector involvement impractical or worse,[29] according to the

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[23] *Id.*

[24] A14-A15.

[25] A15.

[26] *Id.*

[27] *Id.* The court did not explain which "activities" it had in mind in this connection or in what constitutionally material sense they would fail to be "proprietary."

[28] A14.

[29] *See* Doolittle, "Jobs and People in Boston," *supra* note 6, at 29: "The public sector does not have the financial or management resources to imple-

court below, is prevented by the Commerce Clause from giving its own residents any priority in allocating the jobs such projects create.[30]

The very considerations that made commerce clause restraints *applicable* to the City's order in turn proved sufficient, so far as the court below was concerned, to make those restraints *fatal* — despite the facts that: (1) the order imposed *no impediment at all* to individuals who might wish to settle in Boston in order to find work there;[31] (2) it caused no *greater* impediment to out-of-state than in-state *non*-residents seeking to work in Boston without changing domicile;[32] (3) it had *absolutely no impact* on "[t]he *vast majority* of out-of-state contractors," who "generally receive the majority of the members of [their] work crews from the local unions in whose geographical jurisdiction the work is being performed";[33] (4) it

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ment programs of crucial importance to the city [without] private involvement."

[30] A14-A15.

[31] A15.

[32] The court's recognition that the order's "'negative' effect is felt in significant part by other citizens of the Commonwealth, as well as by residents of other States," A13, indeed *understates* the ratio of in-state to out-of-state impact on this record. Between December 1978 and October 1980, some 55.8% of the workers employed on City-funded construction projects resided outside Boston but within Massachusetts; only 3.8% resided outside the state. *See* A48 (Exhibit E to Appendix II to Agreed Statement). The data, which are stipulated to be "representative," A44, reveal *no reduction whatever* in percentage of out-of-state residents on City-funded projects after the October 15, 1979, effective date of the order. *See* A48. During December 1978 in particular — the month for which the most detailed data is available — 443 workers were employed on City-funded projects. Of these, 259 were Massachusetts residents from outside Boston; only 12 were out-of-staters. And, of these 12, at most 7 could even potentially have been affected if the order challenged here had been in force, since the other 5 were already working for firms which already employed more Boston residents than non-residents. *See* A49-A50 (Exhibit F to Appendix II to Agreed Statement).

[33] A41 (¶ 15(a)) (emphasis added).

caused no *greater* "[d]iscouragement of . . . contractors located outside the City of Boston" but in Massachusetts than of "contractors located outside the Commonwealth";[34] and (5) there was no showing that *any* out-of-state firms which might be deterred from bidding on Boston public works contracts in light of such firms' preference for permanent crews over on-site hiring[35] would be effectively *precluded* from competing for such contracts[36] or that any such firms, if *choosing* not to compete, would not simply be *replaced* by other out-of-state participants. Even if, for all these reasons, the order would "have little impact on the structure of the industry or its functioning in interstate commerce,"[37] the mere existence of an *adverse impact upon some out-of-state firms* choosing to "employ permanent work crews composed of out-of-State residents"[38] sufficed, in the court's view, to make the order a *per se* violation of the Commerce Clause — notwithstanding its legitimate aims and effects.

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[34] A37 (¶ 9(j)). Indeed, the record again indicates just the reverse. *Cf.* note 32 *supra*. In December 1978, 59 of the 67 contractors involved in City-funded construction employed exclusively in-state workers. A49-A50. Of the 8 that employed some out-of-state workers, three firms would have been required to make no changes under the order since they already employed at least 50% Boston workers. Two of the remaining five companies were Massachusetts firms; the addresses of the last three are listed on the Exhibit as unknown, A50, but in fact are Massachusetts corporations — as a matter of public record. In sum, at most three companies which *might* have been out-of-state firms (but in fact are not) could even potentially have been affected by the order in the only sample month for which a detailed breakdown exists.

[35] A6-A7.

[36] Contrast the stipulated fact that the state statute also struck down below but not involved in this case, *see* note 2 *supra*, would effect not simply the "[*d*]*iscouragement*," A37 (¶ 9(j)) (emphasis added), but the "*preclusion* of some out-of-state employers . . . from obtaining public works construction contracts in the Commonwealth." A40 (¶ 13(g)) (emphasis added).

[37] A6.

[38] A14.

Whether the Commerce Clause creates any such obstacle to municipal options for coping with inner-city joblessness, urban decay, and racial strife is the central issue posed by this case.

Summary of Argument

The centrifugal movement of capital and affluence to suburbia is in part caused by, and in turn leaves in its wake, city structures in need of repair and city residents in need of work. With increasing numbers of such residents belonging to minority groups long victimized by racial discrimination, the story of those who are left behind by this exodus to the suburbs becomes ever more a story of persistent joblessness, perpetuated by a lack of the very skills that job experience alone might provide. This sorry legacy in turn ravages the city as it traps those who can afford neither to leave it nor to live in it decently.

America's cities have few viable options for breaking this awful cycle. Among the most promising is that of directly rebuilding the city itself, making it a more attractive environment for those who have some choice about where to live and a more livable home for those who have no such choice, through public works programs designed not simply to reconstruct the city *physically* but to expand the pool of *human* opportunities — for work and for job training — available to its residents, and to maximize the *fiscal* return to the city and its people from the tax dollars collected from them by all levels of government.

Giving the city's own residents priority in filling the jobs created by city-sponsored public works projects uniquely achieves these goals while attacking indirectly — and in a

manner least likely to be thought unfair by those whom minority quotas exclude — the festering problem of racial prejudice and its legacy of a disproportionately non-white, and disproportionately disadvantaged, inner-city population. At the same time, such a policy gives city taxpayers assurance that a fairer share of the city, state, and federal taxes collected from them will be put to work for the benefit of their own neighborhoods, in projects built by their own neighbors' hands. The gain in morale, and in shared willingness to treat city construction projects as a source of pride rather than a site to be vandalized by angry neighborhood residents while commuting construction workers arrive on the scene late or not at all, is incalculable.

Each city's freedom to structure its tax-supported public works projects to achieve at once all of these tightly linked goals — by contracting only with firms willing to do a substantial fraction of their hiring from within the city's own population — is thus vital to the future of urban life in America, both in itself and as an instance of the sorts of policy options that a city's leaders must be free to choose.

Yet the City of Boston has been told that it has no such freedom — that the Commerce Clause rules out the one approach to awarding public works contracts through which Boston might, at a single blow, have hoped significantly to mitigate its most persistent human and economic problems.

To be sure, the Commerce Clause leaves states and cities free to enter the marketplace as buyers or sellers of goods and services and, in that capacity, to favor their own residents over others. This Court so held in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). And the Commerce Clause permits cities to reserve city jobs for city residents. This Court so held in *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). But publicly funded jobs on city-sponsored public works projects using private firms, the court below held, are

different — although this Court in *Reeves* cited with approval a local hiring preference in *precisely* that context. *See Reeves*, 447 U.S. at 437 n.9, citing *People ex rel. Holland* v. *Bleigh Construction Co.*, 61 Ill.2d 258, 274-75, 335 N.E.2d 469, 479 (1975). For the court below, the city's role in generating such jobs — at least when some of the locally raised tax revenues involved are *channeled* into those jobs through state and federal agencies and then through firms contracting with the city — is for some reason insufficiently "proprietary" to fall within the principle of *Reeves*. Boston is thus free to prefer its own residents when it sells concrete — as South Dakota did in *Reeves* — but not when it contracts to build concrete roads and reservoirs!

This brief argues *first*, that these distinctions should either have made no constitutional difference or should have cut distinctly in the City's favor: the immunity that state and municipal marketplace actions enjoy from commerce clause strictures on protectionist regulation should, if anything, be *enhanced* by the governmental and hence "non-proprietary" functions the City of Boston seeks to perform in this case. Nor should Boston's reliance on private firms as public works employers, and on all available channels of tax revenue for public works projects, have made the slightest difference to the result.

The brief argues *second*, that the preference for city residents in Boston's public works program, *even if shielded by no special immunity*, should easily have survived the commerce clause scrutiny that, in the hands of the court below, oddly spelled its demise. As that court necessarily conceded, the preference in question is not directed, either on its face or in fact, at out-of-staters. The order discriminates not at all against out-of-state firms, which are as free as in-state firms to meet the City's hiring criterion. It treats *all* employees who reside outside Boston — and who must thus commute across

town lines rather than work near home — the same way regardless of the *state* in which they live. And it puts *inter*state commerce at no disadvantage whatever as compared with *intra*state commerce. Nor is any "burden" that the executive order imposes on commerce across state lines even substantial, let alone excessive — either in absolute terms, *or* in comparison with the burdens imposed on in-state commerce, *or* in comparison with the program's vital non-protectionist purposes and effects.

For the court below, however, it evidently sufficed simply to observe that the program's residential preference would lead some non-Massachusetts firms (along with some Massachusetts firms) to drop out of the bidding on public works contracts with the City of Boston rather than conform their mode of doing business to one relying less on permanent employees and more on employees hired at or near the construction site. Nothing more was, or could have been, shown. But this Court's decisions leave absolutely no doubt that this prospect, even if conceded, creates no commerce clause objection. Finally, even if some of the program's effects were viewed as *prima facie* objectionable under that clause, the program not only would amply meet the test properly applicable to such non-discriminatory measures but also would survive the strictest scrutiny.

Argument

I. A City's Decision To Confine Its Tax-Supported Public Works Contracts To Firms Willing To Hire A High Enough Percentage of City Residents Is Not "The Kind Of Action With Which The Commerce Clause Is Concerned."[39]

A. *Commerce Clause Immunity For Such Municipal Contract Choices Follows* A Fortiori *From This Court's Decisions in* Reeves[40] *and* Alexandria Scrap.[41]

When acting as market *participants* rather than market *regulators*, state and local governments are free to "favor [their] own citizens over others" unimpeded by the Commerce Clause and its negative implications. *Hughes* v. *Alexandria Scrap Corp.*, *supra*, 426 U.S. at 810. This principle is rooted not only in the limits of the dormant Commerce Clause itself, but also in the fundamental interests of states and their political subdivisions in autonomously structuring their "relations . . . with [their] own citizens," fashioning local solutions to local problems in "distributing government largesse," *Reeves, Inc.* v. *Stake*, *supra*, 447 U.S. at 441, free of such judicial supervision as commerce clause jurisprudence necessarily entails.

It is crucial to recognize that the principle in question is one which operates at the very *threshold* of a commerce clause challenge: if the principle applies, both the challenged measure's impact on commerce and its justifications are beside the point; the measure is simply immune to judicial veto under the Commerce Clause.

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[39] *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976).

[40] *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980).

[41] *See* note 39, *supra*.

For these reasons, nearly all that the court below had to say in purporting to explain why the principle of *Reeves* might be inoperative here, and the Commerce Clause accordingly applicable, was entirely irrelevant, for it bore not at all on *whether* the Commerce Clause applies but only on *how* an analysis under the clause would proceed *if the clause were applicable*. Witness the observations of the court below as to the supposed tendency of Boston's residency criterion to impair interstate business mobility;[42] as to the reach of that criterion beyond the unemployed;[43] and as to the asserted weakness of the city's fiscal interest in light of the mixing of non-local with local revenue sources.[44] At most, such matters might indicate how well or badly the executive order at issue in this case would fare under the Commerce Clause *if applicable*.[45] They plainly have *no* bearing on *whether* it is applicable.

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[42] A14-A15.

[43] A15.

[44] *Id.* *See* note 45 *infra*.

[45] The last-mentioned factor — the presence of non-local revenue sources — is indeed constitutionally immaterial not only to *whether* the Commerce Clause applies but to *what its application would entail*.

First, the court below expressly recognized that "[t]he goals of . . . the executive order [include] ensur[ing] that the expenditure of local funds results in maximum benefits to the locality *where the monies are raised*." A7 (emphasis added). *See also* A19. There is no suggestion here that Boston's challenged contract policy would somehow redistribute fiscal (or other) resources improperly in Boston's direction. And the City's interest in conserving for its residents a fair share of the benefits generated by a City-administered program funded with "taxes paid by [the City's] residents," A35-A36 (¶¶ 7(d), 9(d)), is manifestly independent of whether such taxes are paid entirely to, and thus channeled wholly through, the City's revenue authorities, or are paid partly to, and thus channeled partly through, the revenue authorities of the State and Federal Governments as well.

Second, as this Court held in *Pennhurst State School & Hospital* v. *Halderman*, 101 S.Ct. 1531, 1540 (1981), "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (Footnote omitted.) In the present case, of course, *no* relevant condition — ambiguous

On what conceivable basis, given *Reeves*, might the Commerce Clause be held to apply to the City's action in this case? That the challenged action involves only the City's choice of "how, with whom and for whose benefit to deal," *Reeves*, 447 U.S. at 438 n.10, is beyond cavil. And that making such choices is the essence of economic "participation" rather than "regulation" as this Court has used those terms is likewise indisputable: the City's executive order influences others solely through the City's ability to offer on its own terms, as an additional contracting partner, something that others might voluntarily seek and to which they have potential access only because the City has chosen to create it. *Cf. Hughes* v. *Alexandria Scrap*, *supra*, 426 U.S. at 815-16 (Stevens, J., concurring).[40]

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or otherwise — has been identified as a bar to the City's proposed local hiring preference in the administration of any of the funds in question. And, were such a condition identified, it would then have to be scrutinized in terms of this Court's reminder in *Pennhurst* that "[t]here are limits on the power of Congress to impose [such] conditions." *Id.* at 1540 n.13 (citing, *inter alia*, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)).

[40] This case presents no issue of a state's or city's use of its fiscal power, "as a carrot and as a stick," *Hughes* v. *Alexandria Scrap*, *supra*, 426 U.S. at 796, either to create coercive pressure for "the relocation of labor and industry" into the state, *id.* at 821 (Brennan, J., joined by White and Marshall, JJ., dissenting); or to exploit its geographical resource position "to the disadvantage and displeasure of [its] less strategically situated neighbors." Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 228 (1957). Contrast, e.g., *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911) (local hoarding of natural resources might cause national fragmentation where "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals"). *Accord*, *Hicklin* v. *Orbeck*, 437 U.S. 518, 528-30, 533-34 (1978) (Alaskan oil and natural gas resources); *Hughes* v. *Oklahoma*, 441 U.S. 322, 329-30 (1979) (fish); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) (landfill sites). The job opportunities created by public funds expended by a city on public works construction plainly cannot be equated with natural resources. *See, e.g.*, *Reeves, Inc.* v. *Stake*, *supra*, 447 U.S. at 443-44 (not even state-

The only question that remains is whether some or all of the City's actions pursuant to its contracting role nonetheless fall outside some relevant conception of "market" behavior — whether, as the court below evidently thought, some (too many?) of the "activities affected by the executive order" do not involve "the city . . . acting in its *proprietary* capacity."[47]

Under *Reeves*, a state's decision to prefer its own residents as buyers of state-produced concrete is sufficiently "proprietary" to be immune. How, then, does the municipal decision at issue here differ in character from that in *Reeves*? It differs, if at all, in only two respects: the City's preference runs to its residents as *employees* rather than as *consumers*; and that preference operates with respect to *public works projects* rather than with respect to *ordinarily private goods and services*.

But this pair of differences cuts in exactly the wrong direction so far as the decision below is concerned. The *Reeves* Court was divided, after all, only with respect to the extension of commerce clause immunity to state participation in areas as seemingly remote from "traditional governmental functions" as the production and sale of cement. 447 U.S. at 451 (Powell, J., joined by Brennan, White, and Stevens, JJ., dissenting). But all nine Justices in *Reeves* agreed in finding commerce clause immunity where the government's actions as a market participant take place in an area of "integral government operations [affecting] traditional governmental functions." *Id.*; *id.* at 438 n.10 (majority opinion).

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manufactured cement counts as a "natural resource" for purposes of such commerce clause analysis); *Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371, 385-86 (1978) (state-conserved elk herd not to be equated with natural resources); *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973) (indicating approval of state "policy of preserving state-supported facilities for . . . residents"). Nor does this case involve any other imposition of trade barriers in an essentially regulatory interference with the interstate market.

[47] A15 (emphasis added).

There may, of course, be some ambiguity about the exact meaning of "traditional governmental functions" in this context.[48] But whatever those words can plausibly mean — and however one might define the "public works projects" in which the City "expends or administers" tax revenues as "a signatory to the construction contract,"[49] and to which the challenged order thus applies — one cannot doubt that setting employment criteria for public works projects of this sort at least brings the City *closer* to, not *farther* from, the point at which the *Reeves* Court was *unanimous* in finding the Commerce Clause, of its own force, to be wholly inapplicable.[50]

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[48] In holding that a state's operation of a passenger railroad in interstate commerce is *not* among the "traditional governmental functions" that are "generally immune from federal regulation [even by Congress] under *National League of Cities*," *United Transportation Union* v. *Long Island R. Co.*, 102 S.Ct. 1349, 1354 (1982), this Court stressed that it "meant to impose [no] static historical view of [which] state functions [are] generally immune." *Id.* On *any* view of the matter, however, using tax revenues to construct basic urban facilities and create jobs in connection therewith, *cf. Reeves*, *supra*, 447 U.S. at 452 n.3 (dissenting opinion, contrasting entrepreneurial activities funded by the revenues they generate), seems closer to the traditional core than does "the running of a business enterprise." *United Transportation Union*, *supra*, 102 S.Ct. at 1354 n.11. And the "traditional" core within which "intrinsic . . . Commerce Clause" limits, *Reeves*, *supra*, 447 U.S. at 438 n.10 (majority opinion), are inapplicable may well be broader than that within which even Congress is ordinarily forbidden to exercise control. *Id.*; *cf. United Transportation Union*, *supra*, 102 S.Ct. at 1355-56 (stressing Congress' determinations of need to regulate).

[49] A20.

[50] For almost a century, a central aim of public works programs has been to reduce unemployment and "alleviate distress" in areas experiencing economic difficulty. American Public Works Association, History of Public Works in the United States 1776-1976 at 10 (1976). During the Panic of 1893, for example, a number of cities in the Northeast "set important precedents for using public works to reduce unemployment." *Id.* Public works projects were established in many cities during the New Deal, "cushion[ing] the effects of the dislocation and reliev[ing] human suffering." *Id.* at 11. By the 1950s and '60s, public works projects were being targeted

B. *Any Contrary Conclusion Would Conflict With This Court's Holding in* McCarthy[51] *and Would Be Irreconcileable With* National League of Cities.[52]

The necessary conclusion — that a city is free of commerce clause restraints when it limits its public works contracts to firms hiring local residents — gains further support from yet another line of judicial authority. The court below recognized, as it had to in light of *McCarthy* v. *Philadelphia Civil Service Commission*, *supra*, that a city is free of federal constitutional inhibition when preferring its own residents "in at least certain kinds of direct hiring."[53] But a city government's choices between relying for its public works projects on job-specific, short-term employees and relying for such projects on employees hired for long periods — or between hiring employees for such public works projects through private contractors and doing so directly — obviously involve the internal structuring of functions too traditionally governmental, and at

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even more precisely at those areas hardest hit by economic difficulties, as planners "focused on distressed areas, pockets of unemployment that could be identified and countered selectively." *Id.* During the past twenty years, as public works programs have been designed specifically "to stimulate economic activity in areas burdened with high unemployment and low family incomes," the success of these programs has naturally been linked with their ability to ensure that the jobs they provide go to residents of such "depressed areas." *Id.* at 12. *See generally* J. Isakoff, The Public Works Administration (1938); C. Ridley, The Public Works Department in American Cities 7 (1926); Selden Society, Public Works in Medieval Law, Vol. I (Introduction, p. xxii) (1915); Vol. II (Introduction, p. lvi) (1923).

[51] *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976).

[52] *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

[53] A14.

a level too basic, to permit federal intrusion even by Congress itself absent a clear showing of necessity. *See National League of Cities* v. *Usery, supra*, 426 U.S. at 848 (interest in local sovereignty includes city's freedom to hire on "casual" basis rather than relying on permanent city employees).

No such showing of necessity is imaginable where a city is told — as it would be if the decision below were to stand — that it cannot use city-sponsored public works projects to provide jobs needed by its own residents unless it does its own public works construction rather than contracting with private firms, and uses only permanent municipal employees rather than hiring on an *ad hoc* basis.[54]

Such a mandate would cut to local government's very core — and to what end? The open national economy would gain nothing: by encouraging cities to contract with *no* private construction firms for their public works projects, that mandate would be likely to reduce the "interstate activities of such firms"[55] *more*, not less, than would the city policy at issue in this case. And even if the court below were right in supposing, to the contrary, that "only" the "permanent domicile of employees" would be affected,[56] the clog on interstate mobility would be no less severe. For the Commerce Clause is concerned with the unimpeded migration of *people* as well as with the unobstructed relocation of *corporate activity*. *See Edwards* v. *California*, 314 U.S. 160 (1941) (Commerce Clause precludes state ban on immigration of indigent persons).

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[54] The severe impracticality of any such constraint is obvious. *See* note 29, *supra*. Not even the People's Republic of China has found it feasible to combat chronic unemployment without involving private employers in the effort. *See* New York Times, Nov. 24, 1981, at A1, cols. 1-2; D17, cols. 1-3 ("China, to Relieve Unemployment, Gives Private Sector More Leeway").

[55] A15.

[56] *Id.*

The Supreme Court of New Jersey was surely right, therefore, when it unanimously rejected the reasoning of the court below as "unpersuasive" and held, in *United Building and Construction Trades Council* v. *Camden*, No. A-79 (Feb. 18, 1982), that, because a city which "engaged in its own public works construction . . . could require that all employees on the job be city residents," the city "retains constitutional power," wholly unencumbered by the Commerce Clause, "to prefer its own citizens" when it decides instead "to purchase those services rather than perform them itself." Slip Opinion at 34.

The conclusion seems inescapable that the Commerce Clause *does not apply at all* to the decision by the City of Boston to construct city-sponsored public works projects solely through contracts made by the City with firms willing, if possible, to hire at least as many Boston residents as non-residents for such projects.

II. Even If The Commerce Clause Were Applicable, It Would Not Invalidate Boston's Limited Preference For Its Own Residents As Employees In The City's Public Works Projects.

The constitutional fate of the executive order in this case does not in fact depend on holding that order immune from commerce clause restraints. Given the order's facially non-protectionist structure and the non-protectionist aims and effects revealed by this record, the order would pass muster even if it were accorded no special immunity under such cases as *Reeves*.

A. *This City Preference Triggers at Most a Requirement of Rational Relationship Between Burdens on the Interstate Market and Legitimate Local Ends.*

Recognizing that the order at issue here — unlike state action aimed "solely, or chiefly, at out-of-State residents" or transactions[57] — could not be equated with the "simple economic protectionism" which this Court has subjected to a "virtually *per se* rule of invalidity," *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978),[58] the court below evidently lost sight of the correlative principle: in assessing such *non*-protectionist measures under the Commerce Clause, a court

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[57] A13.

[58] A15. *See* pp. 8-9 & nn. 31-37, *supra*. The presence of significant burdens "within as well as without the state" provides its own political "safeguard against . . . abuse." *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 187 (1938); *id.* at 185 n.2; *cf. Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 783 (1945). That an otherwise forbidden discrimination against interstate commerce cannot be saved by pointing to the theoretical inclusion of in-state, but non-local, interests in the predominantly out-of-state class burdened by the discrimination, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951), is immaterial where, as here, *no discrimination* is established in the first instance. In *Dean Milk*, this Court invalidated on commerce clause grounds a city ordinance which required all milk sold in the city to be pasteurized within a five-mile radius — an area including 5,600 dairy farms producing ten times the city's milk needs. Only 500 of those farms actually supplied milk to the City of Madison. Given the large surplus already present and the consequent improbability that any Wisconsin concern outside the five-mile radius would seek to enter the Madison market, the ordinance effectively served to bar only Dean Milk Co., a large Illinois firm. "In thus erecting an economic barrier protecting a major local industry from competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* at 354. *Accord, Brimmer* v. *Rebman*, 138 U.S. 78 (1891) (facially even-handed fresh-meat statute struck down because of discrimination necessarily built into its operation); *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) (facially non-discriminatory apple labelling statute struck down in part because it operated to raise outside growers' costs while leaving state growers' costs unchanged).

may concern itself only with burdens on "the interstate market, not particular interstate firms," *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127 (1978); *see* p. 9 *supra*, and may not treat such burdens as undue unless they are "clearly excessive" in light of the legitimate state or local interests served, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) — interests the court in this case essentially ignored. *See* p. 6 & n.15, *supra*.

B. *No Constitutionally Cognizable Burdens on the Interstate Market Were Found Below or Revealed by this Record.*

Obviously unable on this record to find any obstruction of the *interstate market* as such,[59] the court below was necessarily content with the simple observation that some out-of-state *firms* "may opt out of bidding on [Boston public works] projects"[60] — a prospect that, without more, is a matter of constitutional indifference under the Commerce Clause, as this Court expressly held (on a far more damning record) in *Exxon*, *supra*.[61]

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[59] *See* pp. 8-9 & nn. 31-37 *supra*.

[60] A7.

[61] The *Exxon* Court upheld a state statute as entailing no "discrimination against interstate commerce" and no presumptively "impermissible burden" on such commerce, 437 U.S. at 126-27, despite the fact that, of the service stations effectively protected from out-of-state competition by the statute, 99% were operated by local interests, while of the excluded class 95% were out-of-state firms. *Id.* at 138 (Blackmun, J., concurring in part and dissenting in part).

C. *Even if the Order's Interstate Consequences Could be Deemed Problematic Under the Commerce Clause, the Order's Legitimate Aims and Effects Would Suffice to Sustain its Validity.*

To reach the contrary conclusion, the court below not only ignored the lesson of *Exxon* but also transplanted the strictest form of "perfect-fit" scrutiny from a Privileges-and-Immunities context not apposite here — and proceeded to apply such scrutiny in a manner that would have been unduly rigid and severe even in its proper setting.

In essence, the court treated as constitutionally decisive the circumstance that this executive order — like the Alaska statute requiring private employers to hire only state residents in all jobs traceable in any way to that state's oil and gas resources, *Hicklin* v. *Orbeck*, 437 U.S. 518, 529, 531 (1978) (holding the statute void under Article IV, § 2) — goes beyond "favoring unemployed or underemployed local residents."[62] For several reasons, however, this observation is beside the point.

First, as the court below necessarily concedes,[63] the executive order is *not* a discrimination against out-of-state residents; thus the heightened scrutiny of Article IV, § 2, simply does not apply.[64]

Second, the basic flaw in the Alaska statute struck down in *Hicklin* finds absolutely no parallel in the order at issue here. Alaska's law exploited that state's strategic resource position vis-a-vis oil and gas reserves — reserves "of profound national importance"[65] — in order to prefer Alaska residents in every

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[62] A15.

[63] A13.

[64] Compare *Pike* v. *Bruce Church*, *supra*, 397 U.S. at 142, with *Toomer* v. *Witsell*, 334 U.S. 385, 398 (1948).

[65] 437 U.S. at 534 (footnote omitted).

sector of private employment even remotely linked to the development of such reserves. 437 U.S. at 530-33. All who came in contact with the oil and gas industry — even as remote *suppliers* of businesses somehow connected to oil and gas leases — fell under the statute's discriminatory spell. *Id.* at 530. Boston's executive order, in sharp and obvious contrast, not only exploits no unique local resource but also confines its reach to jobs on the actual public works projects for which the City makes contracts and on which it expends public funds.[66]

Third, even if the executive order *were* subject to a requirement of close fit akin to that applied in *Hicklin*, the order's extension of a hiring preference to Boston residents who are not *themselves* unemployed or underemployed in no way establishes even that the order is ill-suited to reducing joblessness — much less that the order too loosely fits the *mix* of objectives it is designed to serve. *Cf. Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 116 (1949) (Jackson, J., concurring).

Some of the most tangible of the order's objectives and effects — such as the reduction of absenteeism and tardiness by commuting construction workers — would obviously be difficult if not impossible to achieve through any municipal policy that *failed* to give a significant hiring preference to resident workers, since the problems identified are ones of which

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[66] *See* A24 (¶ B(2)). That subcontractors are also covered by Boston's order does not extend the order's "horizontal" reach; such coverage merely assures that *all* jobs on the City's public works projects are counted without regard to how finely the "vertical" chain of employment and agency relationships is subdivided. Like a program for distributing a fixed and finite set of marked bills in a manner calculated to benefit local residents, such a system does not reach more widely across the private sector simply because it applies regardless of the number of hands through which the set of bills might pass. The Alaska scheme, in contrast, imposes its requirements on *all* hiring by *all* who come into *contact* with the "bills" being circulated. No such open-ended multiplier effect exists under the Boston plan.

nonresidents are a peculiar source. *Cf. Hicklin*, 437 U.S. at 526.

Other less tangible but no less important objectives, such as increasing local participation in and commitment to city projects; reducing the need for racial quotas by relying on the correlation between minority status and city residency itself; and alleviating racial tensions arising out of perceived favoritism for minorities in past affirmative action efforts by the City, likewise point to precisely the links the City has posited among local control, local participation, and the success of local efforts — links that this Court has itself recognized as both legitimate and significant.[67]

Especially when taken together and viewed in light of their interlocking operation, these aims and purposes amply and indeed quite precisely justify the City's policy. Even the existence of "alternative ways of solving" the tangle of urban problems at issue here, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959), would give a court no basis to second-guess the balance among incommensurables that the City chose to strike, *cf. Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 140 (1968), much less to disregard altogether — as the court below plainly did — many of the interests indisputably served by the action challenged in this case. *See Minnesota* v. *Clover Leaf Creamery Co.*, 101 S.Ct. 715, 727-729 (1981); *Pike, supra*, 397 U.S. at 142. And, in any event, any such "alternative" solutions would be hard indeed even to conjure on this record. For the intertwined problems confronted by Boston, as by other metropolitan centers, form a Gordian knot tight enough to challenge any lawmaker.

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[67] *See, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 41, 49-50 (1973); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 469 (1972); *id.* at 478 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting).

Thus, the persisting flow of business and, therefore, of capital away from the central city is matched only by the flight to suburbia of the very groups on whom cities must depend to maintain an adequate tax base. The fiscal and budgetary problems that result strain the ability of cities to provide essential services and exacerbate the contrast between the core cities and the more affluent suburbs. Inner-city (largely minority) unemployment, which exceeds the general rate in the best of times, skyrockets in times of economic stagnation or recession. Intense competition for the few available jobs fuels white inner-city dwellers' resentment of any explicit quota system favoring non-whites — and favoring those whites with the resources to flee beyond the quota's reach.[68]

This unique set of problems presents a contemporary challenge to city governments not faced by smaller municipalities or even by city governments of earlier times. Plainly, any *ad hoc* solution, however carefully tailored to any *one* facet of this overwhelming complex of riddles, is unlikely even to fray the knot and could indeed squeeze it tighter. If they are to have a chance at attacking the knot as a whole, city governments must be given reasonable latitude in attempting imaginative, integrated solutions to this linked set of dilemmas. The executive order in this case offers a fair prospect of taking a major step toward just such a solution and accordingly passes muster even under close judicial scrutiny. *See generally* A. Solomon, ed., The Prospective City (1980).

To be sure, constitutional restraints are not rendered irrelevant just because we live in desparate times. But particularly as local governments increasingly confront what some have called "zero-sum" situations[69] — where nearly every group's gain is, by and large, another's loss — any court that uses the

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[68] *See* notes 6, 13, *supra*.

[69] L. Thurow, The Zero-Sum Society (1980).

Commerce Clause to veto a plainly non-protectionist remedy that promises to move *beyond* the zero-sum bottleneck in light of the "special difficulties [such a remedy] seek[s] to adjust"[70] deploys the Constitution as a far deadlier device than the Framers, always solicitous of state and local needs for flexibility and leeways for experimentation, could possibly have intended.

Conclusion

In expressly entrusting to Congress a power over commerce they thought vital to national cohesion, the Framers limited, by implication, certain congressionally unauthorized intrusions into the private interstate market through state and local taxation and regulation. But the Framers did not thereby doom our nation's cities, when merely participating as contractors in that market, to the fate so casually decreed by the highest court of Massachusetts in this case. Least of all did the Framers, through the vehicle of a Commerce Clause fueled by the negative implications of its silence as to state and local action, tacitly launch a judicial veto over each city's ability to choose its own contracting partners for urban renewal through public works, and to choose those partners in a manner calculated to cope creatively with the complex of problems that both lead to, and are exacerbated by, the exodus from the inner city of wealth and of those who have it.

In short, nothing in the United States Constitution — and certainly nothing in the small, still voice of the dormant Commerce Clause — makes urban decay a federal imperative. The

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[70] F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 33-34 (1937).

holding below, reflecting as it does a strikingly narrower vision of the constitutional possibilities open to city government in twentieth century America, should accordingly be reversed.

Respectfully submitted,

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Respondent's Brief

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IN THE

Supreme Court of the United States.

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,
PETITIONERS,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF OF RESPONDENTS

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Questions Presented

In an effort to alleviate local unemployment, the Mayor of Boston issued an Executive Order which absolutely excludes out-of-state workers from 50% of all jobs in a major segment of the private construction industry of Boston, and requires that firms which employ more than 50% non-Boston residents either fire their "excess" nonresident workers or be eliminated from competition for these construction contracts.

1. Does the Order violate the commerce clause's prohibition of state and local efforts to promote local economic interests by protecting them against competition from interstate commerce?

2. Does the Order violate the protection afforded to nonresidents by the interstate privileges and immunities clause to pursue their livelihoods in other states free from discrimination?

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IN THE

Supreme Court of the United States.

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

PETITIONERS,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Respondents

Constitutional Provisions Involved

United States Constitution, Article I, § 8, cl. 3:

"The Congress shall have Power . . . to regulate Commerce . . . among the Several States. . . ."

United States Constitution, Article IV, § 2, cl. 1:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

Statement of the Case

At issue in this case is a section of an Executive Order of the Mayor of Boston which absolutely excludes out-of-state workers from 50% of all jobs in a major segment of the construction industry in Boston, and requires firms which employ more than 50% nonresidents of Boston either to fire their "excess" nonresident workers or be eliminated from competition for these construction contracts.[1] The Order cites as its authority a state statute mandating such preferences throughout Massachusetts, and as its purpose the alleviation of Boston's unemployment problems.[2] Respondents[3] urge that this Court affirm the unanimous judgment of

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[1] A full text of the Executive Order appears in the Appendix to the Petition for Certiorari at A19-A21.

[2] A19.

[3] The respondents include the parties named in the caption, as well as the individual plaintiff-respondents listed in Exhibit A to

the Massachusetts Supreme Judicial Court holding this Executive Order unconstitutional.

The state statute involved is G.L. c. 149, § 26[4] which established a preference for residents in a range of construction work. The preference took two forms: Massachusetts residents were to be preferred in the construction hiring for state projects, and every county, town or district was to prefer its own residents on local projects.

In September, 1979, invoking the authority of G.L. c. 149, Mayor Kevin H. White of Boston issued the Executive Order part of which is challenged here.[5] Much of the Order has not been challenged for it provides for hiring and contracting preferences *without* regard to place of residence. One provision of the Executive Order seeks to ensure representation by minorities in the workforce by continuing an already established requirement that 25% of all worker hours be performed by minorities.[6] That provision was not challenged at any stage of this litigation. A separate provision requires that 10% of all worker hours be performed by women;[7] that, too, was not challenged in this litigation. A third provision, also not challenged here, continues certain preferences for

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the complaint. These individual plaintiff-respondents include 12 non-Massachusetts residents and 3 non-Massachusetts specialty contractors, who will be most seriously affected by the Executive Order's implementation, *see* A14.

[4] A full text of the state statute appears at A2, n.3.

[5] A19-A21.

[6] A20.

[7] A20.

minority businesses in construction contracting.[8] All of these preferences do not turn on residency, all are not contested, and all are currently in force.

The challenged provision does turn on residency — and residency alone. Stating as his purpose the need to alleviate unemployment in the City of Boston,[9] the Mayor ordered that all private contractors, subcontractors, and specialty contractors working on projects within the scope of the Order must allocate jobs so that at least 50% of all worker hours on a craft-by-craft basis are performed by bona fide Boston residents.[10] The scope of the Executive Order was not limited to "public works" construction — to the construction of roads or schools or libraries. Nor was it limited to construction financed wholly, or even partly, by the City of Boston, or by the State of Massachusetts, or even to construction financed wholly by government sources, whether federal or state or local. Indeed, the overwhelming majority of the construction to which this Order is applicable is not public works, not schools, not libraries, and not little city halls. It is not construction in which City dollars are spent. Rather, it is private construction of private buildings — of hotels and luxury condominiums and private office buildings — by private developers whose costs are subsidized approximately 10% under a federal program funded by the national budget intended to encourage private business development.[11]

Respondents, including associations of Massachusetts contractors, local unions, individual construction workers and

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[8] A20.

[9] A19.

[10] A20.

[11] *See* A42 (¶ 18(b)). *UDAG Project Approval List, Region I,* Department of Housing and Urban Development (Boston, Ma. Feb. 9, 1982) at 1.

firms from New Hampshire, Rhode Island, and Massachusetts, brought suit challenging the absolute residential preferences of the state statute and of Mayor White's Order. Specifically, respondents claimed that the Executive Order was issued in violation of Massachusetts Home Rule law, and contravened the Massachusetts Constitution, and the commerce clause and privileges and immunities clause of the United States Constitution.

The case was decided on the basis of an agreed statement of facts. The parties stipulated that the objectives of the residency aspects of the Order were "the promotion of employment of residents of the City of Boston and the concomitant alleviation of the unemployment of Boston residents"[12] as well as the reduction in the "economic and social costs . . . arising from unemployment of residents of Boston" and the "generation of secondary economic activity . . . by virtue of construction employment of residents."[13] They further agreed that the Executive Order would have these effects, but that it would also result in the unemployment of construction workers who are not residents of Massachusetts and otherwise would have been employed on projects, in the discouragement of contractors located outside of Massachusetts from bidding on affected construction projects, and in increased costs for those contractors who actually perform work covered by the Executive Order.[14] And they agreed that two-thirds of the construction that was governed by the Executive Order during 1980 involved projects that were supported not by the State or the City, but by the federal government — which provided subsidies of approximately 10% for private development under the federal Urban Development Action Grant (UDAG) program, a program whose

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[12] A35 (¶ 7(a)).

[13] A35 (¶ 7(b) and (c)).

[14] A36-A37 (¶ 9(i), (j), and (k)).

stated purpose is to encourage private development. Of the $54,421,040 in construction in 1980 to which the Executive Order was applicable, $34,000,000 involved such federal subsidies.[15]

The Massachusetts Supreme Judicial Court unanimously held both the state statute and the residency preference of the Executive Order issued under the authority of that statute unconstitutional. The court stated that the purpose of both was to alleviate unemployment,[16] and the effect of both would be unemployment for non-Massachusetts residents and exclusion of non-Massachusetts firms from local construction. Indeed, the court found that there was "no doubt that the implementation of the mayor's order will have a *significant impact* on those firms which engage in specialized areas of construction and employ permanent work crews composed of out-of-State residents."[17] As to the state statute, the Massachusetts court, relying on this Court's decision in *Hicklin v. Orbeck*, 437 U.S. 519 (1978), found the absolute state preference clearly unconstitutional under the privileges and immunities clause of the United States Consti-

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[15] A42 (¶ 18(b)). The federal UDAG program is a flexible economic development tool established to provide critical funds for private development projects. The program reflects the federal government's attempt to stimulate and to leverage new or increased private investment in construction of new buildings or renovation of existing structures by providing additional funding. For example, the program might provide funds to aid a developer willing to undertake a major commercial, residential, or mixed use development. After the first two years of the program's operation, the average ratio was 6 private dollars for every UDAG dollar. *The Action Grant Information Book*, U.S. Department of Housing and Urban Development (Washington, D.C. September, 1980).

[16] A7.

[17] A14.

tution, and the State has not sought review of that decision.[18]

Turning to the Executive Order at issue here, the court found that the commerce clause presented a "clear obstacle to the city's order," since it was clearly protectionist in nature and "[s]imple economic protectionism triggers a 'virtually per se rule of invalidity.' "[19] In light of this clear rule, the only issue for the court was whether the Order could escape commerce clause scrutiny — and invalidation as economic protectionism — under the limited exception for a state acting as a "market participant." Emphasizing the fact that a significant percentage of the funds affected by the order are received from Federal sources, the court concluded that "it is inaccurate to describe the preference as a mere use of city-raised funds to further local interests" and that *Reeves*

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[18] A9-A13. Given the decision of the Commonwealth not to seek review of this holding, a substantial question of state law now exists as to the validity of the Executive Order which was issued in specific reliance on that state statute, *see* A19.

[19] A14, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Contrary to the City's claim that the court below "found no obstacle to the order in the Interstate Privileges and Immunities Clause," Brief of Petitioners at 6, the fact is that the court did not rule at all on this claim—one way or the other—in view of the "clear obstacle" of the commerce clause. All it did was to note both that the privileges and immunities claim "may be more difficult" than with respect to the state statute, and that a similar city ordinance in Minnesota had been invalidated on privileges and immunities grounds. A14. And in holding the Order unconstitutional on commerce clause grounds, the Court pointed out that "[c]onceivably, questions concerning the mayoral order could be disposed of on other grounds, but the resolution we reach is ultimately related to the questions necessarily discussed in considering G.L. c. 149, § 26." A6 n.12. Indeed, while the court specifically did not reach the question, the sort of discrimination against non-Boston, Massachusetts residents enforced by the Executive Order here appears to be in clear violation of the Massachusetts Constitution. *See* A14 n.19 ("We do not reach the question whether such discrimination is contrary to the Massachusetts Constitution.").

v. Stake, 447 U.S. 429 (1980) was distinguishable on this ground.[20] Further, the Court noted that it was at least "doubtful" that the City was acting in a proprietary capacity, within the meaning of *Reeves*, in all of the activities affected by the Executive Order, and, moreover, that the Order was not even targeted to the interests which the city asserted as its purported justification.[21]

Summary of Argument

Both the commerce clause and the interstate privileges and immunities clause were intended "to help fuse into one nation a collection of independent, sovereign states," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), and to arrest the "drift toward anarchy and commercial warfare between states," *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949). The Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1927).

In seeking to alleviate its unemployment problems by barring out-of-state workers from half of all construction jobs in a predominantly private market and by excluding from competition interstate firms which employ more than half nonresidents, the City of Boston has acted in clear violation of that fundamental theory. It has attempted to isolate itself from perhaps the single most important economic problem facing the entire New England region — unemployment. It has attempted to protect its own residents from competition by denying to nonresidents their right to compete on an equal footing in the Boston construction market. Its Executive

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[20] A15.

[21] A15.

Order is clearly unconstitutional under both the commerce clause and the privileges and immunities clause.

The commerce clause prohibits efforts by any state to "place itself in a position of economic isolation" in its dealings with another. *Baldwin v. Seelig, supra*, 294 U.S. at 527. While states enjoy broad latitude to regulate to protect health and safety, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). That rule is clearly applicable here. The limited exemption from commerce clause scrutiny for a state acting as a "market participant" cannot immunize Boston's attempt to regulate every phase of the hiring for construction of private buildings in which not a single penny of City funds need be spent. There is no dispute as to the purpose and effect of the Order: by its language, by stipulation of the parties and by the findings of the state supreme court, it is an express effort by the City to alleviate Boston's unemployment by isolating the City from the rest of the region and externalizing the problems. That is economic protectionism, in its classic form. The law in this area could not be clearer: efforts by a local government to gain an economic advantage for its own citizens at the expense of nonresident citizens and businesses "cannot be squared with the Commerce Clause." *New England Power Co. v. New Hampshire*, 50 U.S.L.W. 4223, 4226 (Feb. 24, 1982).

The Boston Order also strikes at the core of the protection of the privileges and immunities clause, which "plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation." *Ward v. Maryland*, 12 Wall. 418, 430 (1870). It is clear that a state statute, such as the Massachusetts statute invalidated below, which excludes out-of-state residents from employment by authorizing or requiring local

hiring quotas in every individual city and town violates that clause. To accept Boston's argument that it should nonetheless be immune from privileges and immunities scrutiny when it issues an Order to further that same end would allow the cities of Massachusetts — and of every other state — to accomplish what the state cannot: the establishment of a system in which residents of each city in Massachusetts can work in their own city, and New Hampshire residents can work nowhere in the state. The "one nation" which the privileges and immunities clause was designed to create out of "a collection of independent, sovereign states," *Toomer v. Witsell*, *supra*, 334 U.S. at 395, could be just as easily destroyed by independent, sovereign cities — each acting to protect their own citizens by discriminating against all those not represented in their political processes — as by independent, sovereign states. Unless nonresidents are "a peculiar source of evil," and unless the discrimination bears "a substantial relationship to the particular 'evil' they are said to present," *Hicklin v. Orbeck*, 437 U.S. 518, 527 (1978), discrimination is prohibited by the privileges and immunities clause. In this case, as in *Hicklin*, Boston's "across-the-board grant of a job preference to all [its] residents," *id.* at 528, is clearly unconstitutional.

Ultimately, the City seeks to revive its Executive Order by arguing that it is "among the most promising" solutions to the problems of urban unemployment and deterioration. Brief of Petitioners at 10-11. The constitutional answer is clear. What the City of Boston's approach promises, in our Union, is precisely the sort of economic warfare and economic balkanization that both the commerce clause and the privileges and immunities clause were designed to prohibit. If Boston can close its doors to non-Bostonians, then New York City can deny work to those in Newark, and Chicago to those in Gary, and St. Louis to those in East St. Louis. Protectionism invites retaliation and counter-retaliation. "[B]ut 'to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the

Constitution.' " *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975), quoting *Travis v. Yale & Towne Manufacturing Company*, 252 U.S. 60, 82 (1920).

Argument

I. The Executive Order Excluding Nonresidents from 50% of All Affected Construction Jobs, and Excluding All Firms which Employ More than 50% Nonresidents, Violates the Commerce Clause.

"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935). While states retain, in our federal system, broad power to regulate to protect health and safety, it has long been established that "the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949).

In a long line of cases addressing challenges to state laws under the commerce clause, the Court has drawn a sharp distinction between laws which are aimed at health and safety problems and only incidentally affect interstate commerce, and those that are aimed at protecting the local economy — local businesses and local workers — against the effects of interstate competition. *See Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 36 (1980). "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H.P. Hood & Sons, Inc. v. Dumond*, *supra*, 336 U.S. at 533. In the case of health and safety regulation, latitude has been afforded to the states, so long as the burdens on commerce are not excessive in light of their legiti-

mate purpose. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). But "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

That *per se* rule is clearly applicable to the Executive Order here. Boston has sought to isolate itself from the single most important economic problem facing the entire New England region — unemployment. It has sought to assure jobs with private contractors for its residents by precluding non-residents from holding them, and precluding out-of-state firms which don't employ sufficient Boston residents from even competing for local projects. It has not limited the effect of its Order to construction projects financed by city dollars, or even state dollars or federal dollars, nor has it limited it to the building of public schools or parks; rather, the Order is fully applicable to the new H.P. Hood plant, to new department stores, to condominiums and private marinas and office buildings throughout the City — financed almost entirely by private investors and not by the City.[22] However well-intentioned the City's effort to help its own residents economically, the fact is that "[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, *supra*, 294 U.S. at 523.

A. *The Executive Order is not Immune from Scrutiny under the "Market Participant" Exception to the Commerce Clause.*

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this Court carved out a limited exemption from any commerce clause

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[22] A42 (¶ 18(b)); *see UDAG Project Approval List*, *supra* note 11, at 1.

scrutiny where a state acts not to regulate the private market but rather simply as a participant in that market. As a market participant, the Court reasoned, a state should be no more severely burdened than a private enterprise; "even-handedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves Inc. v. Stake, supra*, 447 U.S., at 439. Thus, the state of Maryland was held to be free to prefer its own citizens in paying bounties for the processing of automobile hulks, and the state of South Dakota was held to be free to prefer its own residents in the sale of cement from the state-owned plant. But to characterize the City of Boston as a mere "market participant" in its imposition of the exclusionary hiring rules at issue in this case would be an unjustifiable distortion of the facts.

Here, the state is not deciding to whom it ought sell some product it produces or what services it ought purchase. It is telling private parties, private contractors, and subcontractors, whom *they* must hire. Far from merely extending to states the same freedom to deal in the marketplace as is enjoyed by private parties, the effect of affording immunity here would be to impose new state limits on the freedom of private employers and private employees. The City's regulation of the private market is not even limited to those with whom the City contracts: the City's order is fully applicable to subcontractors, and sub-subcontractors — whose contracts are exclusively with other private parties.[23]

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[23] A20. Indeed, the lower court suggested that it is the subcontractor specialty market which may be most adversely affected by the Executive Order, A7, A14, a conclusion amply supported by the record example of H. Carr & Sons, Inc., a Rhode Island specialty contractor and plaintiff here that employs predominantly Rhode Island residents. A typical worksheet for the Carr Company from one of its past Boston jobs—which would have been covered by the Executive Order—is included in the record. *See* JA4.

Contrary to the City's relentless assertions, Brief of Petitioners at 3, 7-8, 10-13, 17-21, 28, the Order here is *not* limited to "city-sponsored public works projects" which the City might have chosen to construct itself, with its own employees.[24] It strains credulity to apply such a label — or to apply the *Hughes* and *Reeves* "market participant" exception — to a project like Copley Place, a project involving the construction of a hotel, a department store, luxury office space and retail stores. That project is being financed by more than $338 million in private investment, and by an $18.8 million UDAG grant.[25] Yet because the City formally signed the application for the UDAG grant, the Executive Order is fully applicable — to all the hiring for a $335 million project.

Copley Place does not stand alone. Other projects covered by the Executive Order include luxury condominiums and a marina for sailboats in Charlestown; new facilities for the dairy company H.P. Hood and for Teradyne, Inc., a Boston manufacturer of electronic equipment; Lafayette Place, a major commercial and retail development in the downtown

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[24] The City makes much of the argument that since it could, theoretically at least, build its public works projects itself and prefer local residents in its hiring, the fact that the City has chosen to rely on private rather than public construction should not limit its ability to promote local employment. And yet, since the City itself claims that public construction at this level is not feasible even in the People's Republic of China, Brief of Petitioners at 20 n.54, the conclusion seems inescapable that what is involved, in this country at least, is a private market which the City is seeking to regulate. Even more basically, it is not simply considerations of feasibility which preclude the City from building these projects themselves: it is the fact that most are private projects, financed by private investment and small federal subsidies, in which the City does no more than sign the application for the federal grant.

[25] *UDAG Project Approval List, supra* note 11, at 1. See also Pierce, "Boston Experiments with Resident Jobs Plan," *Washington Post*, May 23, 1981 at E-8.

area.[26] These are but examples. All told, under the UDAG program, which is specifically intended to encourage private enterprise, over *half a billion dollars* of private construction in the City of Boston is being encouraged by *$34 million* in federal subsidies.[27] These private projects are typical of those covered by the Executive Order. As the City has conceded, roughly two-thirds of the construction to which the Executive Order was applicable in 1980 involved UDAG grants — private construction subsidized by 5% or 10% or 15% federal subsidies.[28]

When the City imposes rules governing the hiring of construction workers for such projects, it is regulating the private market, not merely "participating" in it within the narrow meaning of *Hughes* and *Reeves*.[29] Surely if receipt of more than 90% state funds does not render a private school a state entity, *Rendell-Baker v. Kohn*, No. 80-2102 (June 25, 1982), then receipt of 10% federal funds does not convert a private development into a city public works project. To hold otherwise would immunize from any commerce clause scrutiny not only this Order by the City of Boston, but a wide variety of regulations by any city in the nation that chose to promulgate them. The exception would consume the rule.

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[26] *UDAG Project Approval List, supra* note 11, at 1.

[27] *Id.*

[28] A42 (¶ 18(b)).

[29] Nor does the residency of the construction workers employed by private contractors to build new hotels or stores in any way "hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence,'" *United Transportation Union v. Long Island Railroad Co.*, 102 S.Ct. 1349, 1355 (1982), quoting *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), notwithstanding the City's claims to this effect, Brief of Petitioners at 20. The private construction of predominantly retail and commercial buildings—with private dollars and federal dollars, and in most cases, no city dollars—hard-

If Boston can regulate private employment based on UDAG grants, free from commerce clause scrutiny, every city can. Lowell, Massachusetts, can control the construction of the new Wang facility being built there, and New Bedford, Massachusetts, can limit employment in construction of the Sheraton Whaler, and Hartford, Connecticut, can control employment in the construction of the Aetna building.[30] But the exception is not even that limited. There is nothing peculiar about construction. If a 5% or 10% federal grant is enough to empower the City of Boston, as a so-called "market participant," to order the exclusion of non-Boston workers from construction projects, then surely federal grants and contracts many times that amount to the General Electric plant in Lynn, Massachusetts, are enough to empower the City of Lynn to exclude non-Lynn residents from the thousands of jobs at the G.E. plant. If Boston is immune from commerce clause scrutiny in regulating employment at the Copley Place project, then so would Detroit be if it chose to exclude non-Detroit residents from employment at its federally-subsidized Chrysler plants.

The "market participant" exception of *Hughes* and *Reeves* was never intended to be so broad. It is one thing for a city or state to enjoy immunity from commerce clause scrutiny when it is simply participating in the market — when it is selling its cement, or purchasing services, or even hiring its own employees. It is quite another matter to immunize its regulation of a private market which it did not create, and in which it is neither buying nor selling anything, simply because the federal government has provided a limited subsidy.

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ly presents a stronger case for immunity than did the state's own operation of a railroad, which this Court has unanimously held "is not an integral part of traditional state activities generally immune from federal regulation...." 102 S.Ct. at 1354.

[30] *See UDAG Project Approval List, supra* note 11, at 1-2.

The fact that the City is not a "market participant" does not mean that the City cannot regulate the market at all. It simply means that the constitutional rule which has always been applied by this Court to such regulations — the rule of commerce clause scrutiny — must be applied here.

B. *The Executive Order is a Protectionist Measure.*

"The critical inquiry" in applying the scrutiny of the commerce clause to state regulations "must be directed to determining whether [the law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Notwithstanding petitioner's efforts to complicate it, Brief of Petitioners at 4, 5, 7, 10-11, 20, 26-28, the inquiry in this case is in fact quite simple: the Executive Order, by its language, by stipulation of the parties, and by the findings of the state supreme court, is an express effort by the City to alleviate its unemployment problem by isolating the City from the rest of the region and externalizing the problem. Thus, it is economic protection, and there is no basis to overturn the lower court's finding to that effect.

(1) *The Text of the Executive Order.* —

The Executive Order itself explicitly states its purpose in terms of the economic problems it was designed to address:

> WHEREAS there is a very high rate of unemployment in the City of Boston, particularly among the youth of the City, both white and minority;
>
> WHEREAS the effect of this high level of unemployment has a serious, substantial and deleterious effect for all the neighborhoods of the City of Boston, resulting in the physical deterioration of the neighborhoods, vandalism, and crime;

> WHEREAS there is a particularly high rate of unemployment and underemployment for Boston residents who have worked or seek work in the construction industry . . .[31]

The Order further notes the City's desire to reap the benefit of federal, state, and city taxes,[32] and its intent to satisfy its obligation under the now unconstitutional state statute.[33] In order to meet these goals, the Mayor ordered that nonresidents be excluded from 50% of all jobs — on its face, a patent barrier to interstate commerce. Notably, the concerns with racial tension, with absenteeism, and with potential commuter tardiness, asserted to this Court by the City, are not even mentioned in the Executive Order.[34]

(2) *The Agreed Statement of Facts:*

The parties to this case have also stipulated that the objectives of the residency hiring requirement are:

(a) The promotion of the employment of residents of the City of Boston and the concomitant alleviation of the unemployment of Boston residents.

(b) The reduction in the level of economic and social costs to the City of Boston, which have an adverse multiplier effect, arising from the unemployment of residents of the [*sic*] Boston.

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[31] A19.

[32] In fact, of course, since the bulk of the construction covered by this Order involves UDAG grants, and since Boston receives more UDAG grants than any other city in the region, *see UDAG Project Approval List, supra* note 11, the effect of the Order may well be to allow Boston residents to reap far more than their "fair" share of the taxes they pay for these programs, particularly to the federal government.

[33] A19.

[34] *See* A19-A21.

(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax dollars and federal grants and entitlements within the city's economy.

(d) Ensuring that Boston residents receive some direct benefit from public works projects funded in part by federal, state and city taxes paid by Boston residents.[35]

The parties also agreed as to how these objectives are served by the operation of the order: the employment of Boston residents is promoted at the cost of "the *unemployment* of certain construction workers who are nonresidents of the City of Boston and *nonresidents of Massachusetts who otherwise would have been employed* on projects to which the Executive Order has been applied," and the "*[d]iscouragement* of some contractors located outside the City of Boston and some *contractors located outside the Commonwealth* of Massachusetts from bidding on public construction work resulting in higher costs of public construction because of fewer competitive bids."[36]

(3) *The Decision of the State Supreme Court*

The Order's protectionist purpose and effect — stated explicitly in its text and agreed to by the parties — are reflected in the decision of the Massachusetts Supreme Judicial Court.

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[35] A35. These are the *only* objectives that the parties agreed to. The many other cited by the City in their brief to this Court simply have no basis in the stipulated objectives in the record.

[36] A37 (emphasis added). While the City now makes much of the Order's effect in the alleviation of the aggravation of racial tension, there was no agreement as to that by the parties—the City stated that it would introduce testimony that the Order has such an effect, while the plaintiffs stated that they would introduce testimony

The goals of both the state statute and the residential preference of the Executive Order, the court stated, "are to lessen unemployment in the Commonwealth or in the city."[37] As to effects, the court stated:

> Frequently ... a contractor will have a regular work crew, particularly in certain specialized fields. If some members of a crew are not residents of the Commonwealth or of the city, it will be necessary that they be replaced or, alternatively, their employer may opt out of bidding on these projects. The defendants acknowledge that both results do occur ... there is no doubt that the implementation of the mayor's order will have a *significant impact* on those firms which engage in specialized areas of construction and employ permanent work crews composed of out-of-state residents.[38]

The court clearly found the Executive Order to be a protectionist measure. Indeed, for the state court, it was not even a disputed question; the only issue was whether the Order could be immunized from scrutiny and virtually automatic invalidation under this Court's decisions establishing a limited "market participant" exception to commerce clause scrutiny. The court stated:

> The commerce clause, however, presents a clear obstacle to the city's order. Neither party would, we think, seriously dispute the proposition that an attempt by the city to apply the regulations contained in the order to all private construction would fall to such a challenge. Simple economic protectionism triggers a "virtually *per se* rule of invalidity." *Philadelphia v. New*

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showing no such effect. See A38. There was also no finding on that point by the Massachusetts Supreme Judicial Court. It therefore remains, at this stage, a disputed claim.

[37] A7.

[38] A6-A7, A14 (emphasis added).

Jersey, 437 U.S. 617, 624 (1978).[39]

In sum, the Executive Order amounts to economic protectionism in its classic form. Its purpose is to alleviate unemployment by protecting Boston workers from competition; the means selected include the *absolute* exclusion of all out-of-state residents, *solely on the basis of their residency*, from even competing for 50% of the affected jobs. The impact on interstate commerce is conceded by the City: it has agreed that construction workers who are nonresidents of Massachusetts will be unemployed as a result of the Order; it has conceded that contractors from outside Massachusetts will be discouraged from bidding as a result of the Order; it has accepted that costs of construction will be increased as a result.[40] And the state Supreme Court has specifically found that there will be a "significant impact" on interstate contractors, particularly specialty contractors, and their workers.[41]

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[39] A14.

[40] The higher costs of public construction resulting from this protectionist policy deny to the consumer (and taxpayer) his right to "look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949). *See generally* Note, *In-State Preferences in Public Contracting: States' Rights versus Economic Sectionalism*, 49 *U. Colo. L. Rev.* 205, 214 (1978) ("the theory of comparative advantage indicates that preference laws benefit in-state public contractors only at the expense of taxpayers and other businesses.").

[41] A14. In light of these specific stipulations and findings, there is no basis for the City's claim that the burden on interstate commerce is not constitutionally cognizable, Brief of Petitioners at 23. Moreover, in assessing the constitutionality of a state protectionist regulation, it is appropriate to look not only at the impact on interstate commerce of the particular State's regulation, but also at the likely impact on commerce of a rule which would allow other cities and states to follow suit. *See, e.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538-39 (1949) ("We need only consider the

That there will also be a significant impact on intrastate commerce hardly saves the Order from invalidation. Racial discrimination does not become fairness if Jews and women are also excluded. Nor can the City's order be saved from scrutiny and invalidation on the ground that it protects local firms and workers from *intrastate* as well as *interstate* competition — that Boston has "shut its gates," *Edwards v. California*, 314 U.S. 160, 173 (1943), at the city rather than the state lines. This very argument has been specifically rejected by the Court in the past, and with good reason: it would allow the single nation, "sink[ing] or swim[ming] together," which the commerce clause was intended to foster, *Baldwin v. Seelig*, *supra*, 294 U.S. at 523, to be replaced by a collection of independent, city-states, excluding from economic competition all those who are not represented in their political processes.[43]

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consequences if each of the few states that produce copper, lesser high-grade iron ore timber, cotton, oil or gas should decree that industries located in that state shall have priority . . . . Or suppose that the field of discrimination and retaliation be industry . . . . . "). *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942) (aggregation concept applied in determining Congressional power to regulate commerce).

[43] In *Edwards v. California*, *supra*, the Court emphasized that one of the problems with the California prohibition against transporting indigents was that "the indigent nonresidents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy." 314 U.S. at 174. The Mayor of Boston is elected solely by the citizens of Boston. As in *Edwards* the "real victims" of the Order—the non-Boston workers and firms—are *all* excluded from the political process which produced it, and which could change it. *See* p. 34 and note 56 *infra*. The usual justification for deferring to state decisions when intrastate interests are affected by regulations—that the impact on intrastate commerce "is a safeguard against their abuse," *South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177, 185 (1938)—is simply inapplicable here.

In *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891) (Harlan, J.), this Court invalidated a Virginia statute which imposed a local inspection tax on the sale of any fresh meat slaughtered one hundred miles or more from the place offered for sale. In doing so, the Court specifically rejected the argument that the statute was not discriminatory because Virginia producers located more than one hundred miles from a given market bore the same burden as non-Virginia producers who also happened to be more than one hundred miles away:

> Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all States, including Virginia; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota v. Barber* [136 U.S. 313, 326 (1890)]; *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497.[43]

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), this Court again rejected the argument that the exclusion of interstate commerce is not impermissible if some intrastate commerce is also affected. In that case, the City of Madison had adopted an ordinance which provided that milk could not be sold in the city without a local permit, that the city was not

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[43] The *Brimmer* Court went on to note that "[i]f the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced." *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891). In that case, of course, at least *some* non-Virginia sellers—those within one hundred miles of the Virginia market—would be unaffected by the tax; in this case, *all* non-Massachusetts residents are excluded from the affected Boston jobs.

required to inspect farms — for permit purposes — located beyond a twenty-five mile radius of the center of Madison, and that no milk could be sold as pasteurized unless processed at a plant within five miles of the central square of Madison. In this Court, the City of Madison, like the City of Boston in this case, argued that its ordinance did not discriminate against interstate commerce because:

> All of Madison's milk regulation ordinances . . . apply equally to milk produced any place — whether within or without the state, in the immediate vicinity of the city or at a great distance from it. All the regulatory ordinances apply equally to milk produced on the Madison, Milwaukee, Green Bay or any other Wisconsin milk-shed as well as to that produced on the Chicago or any other foreign milk-shed.

Brief of Appellees at 57-58.

This Court rejected the argument out-of-hand: "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n.4. While the Madison ordinance, unlike the Boston order, was aimed not at promoting the local economy but at preserving the health of local consumers, this Court invalidated it nonetheless because "in practical effect [it] excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois." *Id.* at 354. So, too, the Boston order "in practical effect" excludes from the City qualified workers and qualified firms from Rhode Island and New Hampshire. And in this case, that is not only its "practical effect," but also its purpose.

C. *As a Protectionist Measure, the Executive Order is Clearly Unconstitutional.*

The law in this area could not be clearer: efforts by a local government to gain an economic advantage for its own citi-

zens at the expense of nonresident citizens and businesses "cannot be squared with the Commerce Clause." *New England Power Co. v. New Hampshire*, 50 U.S.L.W. 4223, 4226 (Feb. 24, 1982). Thus, this Court held unconstitutional California's attempt to prohibit the transportation of indigent, unemployed persons into the state, because no limit on state activity "is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Edwards v. California*, 314 U.S. 160, 173 (1943). So, too, the Court in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 526, 532 (1949) rejected New York's efforts "to protect and advance local economic interests," specifically the local milk industry, emphasizing that "the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." So, too, for South Carolina's efforts to promote local employment in the unloading and packing of the shrimp caught in her waters, efforts which this Court found would unconstitutionally "divert to South Carolina employment and business which might otherwise go to Georgia ... [and] impose an artificial rigidity on the economic pattern of the industry." *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948).

In each of these cases — as in this case — the local efforts at economic protection were advanced as essential to the overall welfare of the city or state involved. It was not simply economic protectionism, but a need to deal with "problems of health, morals, and ... finance," *Edwards v. California*, *supra*, 314 U.S. at 173, or problems of "urban deterioration," Brief of Petitioners (Questions Presented)[44] that was sup-

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[44] Nor does Boston's assertion of the additional objectives of alleviating racial tension, inspiring pride among city residents, reducing vandalism, absenteeism, or tardiness save its Order from invalidation as economic protectionism. For one thing, *none* of

posed to justify the protectionist rule. But that has never been enough:

> Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range.

Baldwin v. Seelig, *supra*, 294 U.S. at 523.[45]

Whether or not the Boston policy would in the long run help its unemployed residents and alleviate urban deterioration

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these objectives were stipulated to by the parties as among the purposes of the Order nor were they included in the Order itself as among its objectives. Moreover, "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). In *Philadelphia v. New Jersey*, unlike this case, there *was* record evidence that the purpose of New Jersey's ban on the importation of waste was both to protect the local economy and to protect the local environment. The Court found it unnecessary to resolve the dispute about "ultimate legislative purpose," noting that "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27. That, of course, is what the City of Boston has done here, with respect to out-of-state workers, who are treated differently solely on the basis of their residency.

[45] *See also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43 (1980) ("in almost any commerce clause case it would be possible for a State to argue that it has an interest in boistering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the commerce clause prohibits a State from using its regulatory powers to protect its own citizens from outside competition.")

and racial tension is open to serious question. If the City is correct about the "centrifugal movement of capital and affluence to suburbia ... leav[ing] in its wake ... city residents in need of jobs," Brief of Petitioners at 10, then the "answer" advocated by Boston might harm City residents more than it helps them, for it would allow suburbia to close *their* gates to City residents.[46] Members of minority groups already victimized by racial discrimination might easily find themselves victimized by another form of discrimination as well: if Boston can close its doors to non-Bostonians, then New York City can close its doors to the residents of Newark, and St. Louis can close its doors to the residents of East St. Louis, and Virginia and Maryland communities can close their doors to the residents of Washington, D.C.

The constitutional answer is clear. The route which Boston seeks to pursue to alleviate urban unemployment, the route which it describes as "among the most promising" and as "vital to the future of urban life in America," Brief of Petitioners at 10-11, is fundamentally inconsistent with the constitutional theory upon which this nation was founded. What the City of Boston's approach promises, in our Union, is precisely the sort of economic warfare and economic balkanization that the commerce clause was designed to prohibit.

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home

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[46] If, on the other hand, the City is wrong, and the bulk of jobs and economic growth of the region is concentrated in Boston, then the City policy may "work" for Boston residents only at the expense of severe hardship for residents of the rest of the New England region. It is worth noting, too, that as of 1979, well over half of all those whose incomes were below government poverty levels lived outside center cities. U.S. Bureau of the Census, *Current Population Reports*, series P-60, No. 129.

> embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. DuMond, *supra*, 336 U.S. at 539.

Boston is not the only city in the nation which has adopted a residency hiring program. Variants of the Boston plan are being introduced in other cities, including Dayton, Ohio, St. Paul, Minnesota, Cambridge, Massachusetts, and Wilmington, Delaware.[47] More can be expected — not only because of whatever "promise" they may hold out, but also because local protectionism almost always breeds more local protectionism; indeed, that was the experience of the colonies which led to adoption of the Constitution and the formation of the Union.[48]

The theory upon which this Union was framed — "the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not in division," *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935) — condemns the Boston plan. But the commerce clause will also protect Boston in the future, "just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Philadelphia v. New Jersey*, *supra*, 437 U.S. at 629.

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[47] Pierce, "Boston Experiments with Resident Jobs Plan," *Washington Post* (May 23, 1981) at E-8.

[48] *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949) ("When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began....").

II. The Residential Employment Quota for the Construction Industry Violates the Privileges and Immunities Clause of the Constitution of the United States.

The interstate privileges and immunities clause, like the commerce clause, was intended "to help fuse into one nation a collection of independent, sovereign states." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Both had their origins in the fourth of the Articles of Confederation;[49] both had as their purpose the arrest of the "centrifugal tendency" generated by "the practice of some States denying to outlanders the treatment that its citizens demanded for themselves." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). The commerce clause furthers this goal by its protection of the common market among states, *see H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949); the privileges and immunities clause furthers it by protecting the right of the individual citizen to participate in that market on equal footing with citizens of the regulating state.[50]

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[49] Article Four provided:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Austin v. New Hampshire, 420 U.S. 656, 660 (1975).

[50] While the commerce clauses protect the interstate market, the privileges and immunities clause protects the personal rights of each individual to participate. As a result, its application has never been held to turn on the number of nonresident sellers, *Ward v. Maryland*, 12 Wall. 418 (1870), or fishermen, *Toomer v. Witsell*,

A. *The Privileges and Immunities Clause Applies to the Exclusion of Out-of-State Residents from a Major Segment of the Boston Construction Market.*

Consistent with the clear purpose and objective of the privileges and immunities clause, it has long been recognized that the clause "plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other State of the Union for the purpose of engaging in lawful *commerce, trade,* or *business* without molestation." *Ward v. Maryland*, 12 Wall. 418, 430 (1870) (emphasis added). While there has been some disagreement as to whether the clause requires equality with respect to all rights and privileges conferred by a state on its own citizens, or only those that might be termed "fundamental," *see Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 381 (1978), there has never been any disagreement that "one of the privileges the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Many of this Court's most significant decisions invalidating state laws on privileges and immunities grounds have come in the context of state efforts to limit nonresidents' commercial and employment opportunities. *See, e.g., Ward v. Maryland*, 12 Wall. 418 (1870); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Mullaney v. Anderson*, 342 U.S. 415 (1952); *Hicklin v. Orbeck*, 437 U.S. 518 (1978). And where the Court has upheld allegedly discriminatory state laws against privileges and immunities challenges, it has almost invariably emphasized that the challenged laws do *not* burden nonresidents in their efforts to earn a living.[51]

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334 U.S. 385 (1948), or taxpayers, *Austin v. New Hampshire*, 420 U.S. 656 (1975), actually affected by a state rule.

[51] *See, e.g., Baldwin v. Montana Fish and Game Commission*, 436

The City of Boston, by absolutely excluding nonresidents from even competing for 50% of the jobs in a major segment of the construction industry, has adopted a rule which not only discriminates against out-of-staters on its face, but also imposes upon them a burden which strikes at the very core of the protection of the interstate privileges and immunities clause of the United States Constitution.

B. *The Fact That Some Massachusetts Residents Are Also Excluded Does Not Immunize the Executive Order from Privileges and Immunities Clause Scrutiny.*

The City has argued that because Massachusetts residents living outside Boston are excluded along with out-of-state residents from private construction jobs in the City, the Executive Order at issue should be considered immune from review under the privileges and immunities clause. Brief of Petitioners at 24. In essence, its argument is that individual cities should be granted greater freedom to prefer their own residents and to discriminate against outlanders than the Constitution affords to states.

The privileges and immunities clause clearly precludes individual states from barring out-of-staters from working within the state as a whole, or any particular city within it. *See, e.g., Ward v. Maryland*, 21 Wall. 418 (1870) (Baltimore County); *Hicklin v. Orbeck*, 437 U.S. 518 (1978). The Massachusetts statute upon which the Mayor of Boston relied in issuing his Executive Order sought to do just that, not only by establish-

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U.S. 371, 388 (1978) (upholding higher license fees for nonresident elk hunters):

> "Elk hunting by nonresidents in Montana is a recreation and a sport.... It is not a means to a nonresident's livelihood.... Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or by access to any part of the State to which they may seek to travel."

ing a statewide residential hiring preference for state projects, but by mandating that every city, town and county establish a hiring preference for its own residents.[52] The state court held that statute unconstitutional on privileges and immunities grounds,[53] and, as noted earlier, the state has not appealed. Yet if a state statute authorizing and requiring every city and town to impose local residential hiring quotas violates the privileges and immunities clause, the City's assertion that it is immune even from privileges and immunities scrutiny when *it* issues an order (under the authority of that unconstitutional statute) to accomplish that same end is simply unreasonable.

If Boston can exclude non-Bostonians, then Brockton, Massachusetts, can exclude those who don't live in Brockton and Fall River, Massachusetts, those who don't live in Fall River and New Bedford, Massachusetts, those who don't live in New Bedford. The end result would be to place the resident of New Hampshire or Rhode Island in precisely the same position as he would have been under the unconstitutional Massachusetts statute; severely burdened, if not wholly precluded from seeking construction employment anywhere in Massachusetts.

To be sure, New Bedford and Fall River and Brockton have not yet taken such action. But if Boston—the largest city in the New England region and the largest recipient of federal construction subsidies in the New England region[54]—can freely exclude non-Bostonians from working, there is no constitutional reason why New Bedford, Fall River, and Brockton cannot follow suit. Contrary to the thrust of the City's argument, the unemployment problems of the City of Boston are in fact *less* severe than those of many other

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[52] A2, n.3.

[53] A13.

[54] *See UDAG Project Approval List, supra* note 11.

cities—inside and outside of Massachusetts. New Bedford and Fall River and Brockton all have unemployment rates which are higher, and are growing faster, than Boston's.[55] If, as petitioners claim, residential hiring requirements are "among the most promising" ways to alleviate Boston's unemployment, Brief of Petitioners at 10, there is no reason to expect that other cities would ignore this "promising" approach, particularly now that Boston has acted first. Indeed, historically, one of the major problems with state and local efforts at economic protectionism has been that they invite retaliation and counter-retaliation. *See Toomer v. Witsell*, 334 U.S. 385, 388 (1948); *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975). And in this case, the declared policy of Massachusetts—reflected in its unconstitutional statute—is that every city and town *should* do as Boston has.

In effect, immunizing the action of the city of Boston from constitutional scrutiny would allow the cities to accomplish what the state could not: the establishment of a system in which Boston residents can work in Boston, Fall River residents can work in Fall River, New Bedford residents can work in New Bedford—and New Hampshire residents can work *nowhere* in Massachusetts. The City has offered no reason that cities should enjoy greater freedom to discriminate than states. Certainly, precedent suggests the contrary. *Cf. Community Communications Company v. Boulder, Colorado*, 50 U.S.L.W. 4144 (January 13, 1982); *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 232-33 (1964); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). A city, like a county, is "the creature of the state exercising and holding powers and privileges subject to the sovereign will."

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[55] *See* Dwyer, "Recession Slows Cities' Recovery," *Boston Herald American*, April 29, 1982, at 23 (citing survey released by Chase Econometrics); March, 1982 Labor Force Unemployment Data, Massachusetts Division of Employment Security (Boston, Mass. April, 1982); A40 (¶ 14).

City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923). "What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974).

Furthermore, if the City's Order is examined independently of the unconstitutional state statute, it fares no better. First, it is open to attack because none of those against whom it discriminates were represented in any way in the process which led to its promulgation. Generally, where a nonresident challenges an exclusionary state regulation, the fact that similarly situated state residents are equally burdened provides a basis for upholding the regulation as nondiscriminatory. This is so because where a state does not distinguish between its own residents and out-of-state residents, its political processes can generally be relied upon to have considered properly the interests that the nonresident shares with the similarly-situated resident. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). But here, there is no such political accountability. The burden imposed by the City of Boston on the resident of Brockton, Massachusetts, cannot justify acceptance of the burden imposed on the New Hampshire resident as nondiscriminatory because neither of them is represented in the political processes of the City of Boston. The Mayor of Boston, who issued the Executive Order here, was elected by the citizens of Boston and is accountable only to them. The discrimination is between those to whom he is accountable and those to whom he is not, including all out-of-state residents.[56] Such discrimination clearly demands scrutiny under the privileges and immunities clause.

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[56] Nor is it any answer to suggest that since the City is a creature of the state, and since all Massachusetts residents are represented in the Massachusetts legislature, the interests of New Hampshire and Rhode Island residents are adequately represented. Such an answer ignores the fact that the Massachusetts legislature *has*

Scrutiny is required for a second reason as well. "The primary purpose of this [the privileges and immunities] clause ... was to help fuse into one nation a collection of independent, sovereign states." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The exception to scrutiny urged here by the City of Boston carries with it the very real potential to defeat that purpose. The "one nation" envisioned by the privileges and immunities clause could be just as easily destroyed by independent, sovereign cities as by independent, sovereign states. If Boston can freely exclude non-Bostonians from working in Boston, there is no constitutional reason why New York City cannot exclude those who live in Newark (as well as Albany) and why Arlington, Virginia cannot exclude those who live in Washington, D.C. (as well as Richmond). And for those who are excluded, the only recourse—other than the United States Constitution—is to seek retaliation by their own cities. "[B]ut 'to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution.' " *Austin v. New Hampshire, supra*, 420 U.S. at 662, quoting *Travis v. Yale & Towne Manufacturing Company*, 252 U.S. 60, 82 (1920).

C. *The Executive Order Excluding Nonresidents from Boston Construction Jobs Fails to Pass Scrutiny Under the Privileges and Immunities Clause.*

If the right to pursue one's livelihood is protected by the privileges and immunities clause—as it surely is—and the Executive Order is subject to scrutiny on the grounds that it

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acted already, albeit unconstitutionally: it passed a statute excluding out-of-staters from construction work in *every* city, town, and county in the state. The Boston order is part of that scheme—a scheme which *does not* treat the Massachusetts resident and the out-of-state resident similarly, a scheme which *does*, on its face, discriminate against non-Massachusetts residents. And short of

discriminates against those who live out-of-state—as it surely does—then the only question remaining is whether the Order passes scrutiny under the privileges and immunities clause. Under clearly established principles, it does not.

First, the Executive Order was issued with the clear purpose of alleviating unemployment in the City of Boston; the text of the Executive Order itself, and the delineation of its "objectives" make that explicit. However, this Court has *never* held that a State may, consistent with the privileges and immunities clause, validly attempt to alleviate its unemployment problems by requiring private employers to discriminate against nonresidents.[57] The "assumption" that it may do so is "made at least dubious by *Ward* [*v. Maryland*]." *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978). It is made more dubious still by this Court's decisions under the commerce clause—with which the privileges and immunities clause shares not only a common history, *Austin v. New Hampshire*, *supra*, 420 U.S. at 661, but also "a mutually reinforcing relationship," *Hicklin v. Orbeck*, *supra*, 437 U.S. at 531. Surely, if economic protectionism does not serve as a valid basis for state regulations discriminating against interstate commerce under the commerce clause, it is difficult to see how it can possibly serve as a valid basis for state or local regulations discriminating against interstate workers under the privileges and immunities clause. The "shared vision of federalism" of the two clauses, *id.* at 532, can hardly tolerate such diversity.

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passing a statute *prohibiting all* cities and towns from adopting local hiring preferences—which of course, is exactly the *opposite* of what the legislature has in fact supported and voted for—the Massachusetts legislature does not regularly review individual rules or orders adopted by cities and towns under their Home Rule Authority.

[57] The conditions a City or State may impose on public—as opposed to private—employment are not at issue here. *Cf. McCarthy*

Second, the City has failed to demonstrate that "non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Toomer v. Witsell*, 334 U.S. 385, 398 (1948), as it is required to do. The record does not establish this defense, and the City's own argument undercuts it: petitioner asserts that Boston's unemployment problem is due to a lack of "skills" among its residents, Brief of Petitioner at 10, rather than to unfair competition from out-of-state residents.[58]

Third, even where a state or city demonstrates that non-citizens are "a peculiar source of evil," the discrimination must still bear "a substantial relationship to the particular 'evil' they are said to present" for it to pass constitutional muster. *Hicklin v. Orbeck, supra*, 437 U.S. at 537. In *Hicklin*, the Court invalidated on this ground an Alaska residential hiring preference imposed on private employers holding state oil and gas leases. The program, the Court held, simply grants all Alaskans, regardless

> . . . of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents—again, a policy which may

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v. Philadelphia Civil Service Commission, 424 U.S. 645, 646 n.6 (1976) ("a public agency's relationship with its *own* employees . . . may justify greater control than that over the citizenry at large.") (emphasis added).

[58] Indeed, since the City has argued that the burden of its Order on the interstate workforce is not "constitutionally cognizable" for commerce clause purposes, Brief of Petitioners at 23, it would ap-

> present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

437 U.S. at 527-28.

The same is true of the Executive Order at issue here.[59] It

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pear inconsistent for it to argue that, for privileges and immunities clause purposes, out-of-state residents do constitute a "peculiar source of the evil" of Boston unemployment so as to justify their exclusion from 50% of the affected jobs.

[59] The City's efforts to distinguish *Hicklin* are entirely unpersuasive. First, the City claims that *Hicklin* is distinguishable because the rule there extended not only to those directly holding state-issued oil and gas leases, but also to subcontractors and suppliers who may themselves have no direct dealings with the State. Brief of Petitioners at 25. Yet the same is true here: the Order applies with full force not only to contractors in privity with the City, but also to subcontractors and specialty contractors "despite the fact that none of these employers may themselves have direct dealings with the [City]. . . ." *Hicklin v. Orbeck, supra*, 437 U.S. at 530. The City's claim that Boston's order "confines its reach to jobs on the actual public works projects for which the City makes contracts and on which it expends public funds," Brief of Petitioners at 25, is plainly inaccurate: it ignores the fact that the Order is *not* limited to "public works," but in most instances applies to private construction of private hotels and office buildings and stores; it ignores the fact that the Order applies with full force even where not a single penny of City money has been expended; and it ignores the fact that the Order is equally applicable to the contractors with whom the city contracts and the subcontractors with whom it does not. *See* pp. 13-15 *supra*.

Nor can the Order be saved, as the City claims, by scrutinizing it not in relation to its clear goal of alleviating unemployment, but instead viewing it as an effort by the City to "reduc[e] absenteeism and tardiness by commuting construction workers." Brief of Petitioners at 25. For one thing, these objectives were never mentioned

grants Bostonians a "flat employment preference" for—indeed, a virtual monopoly of—half of all affected jobs. The mandate is not based on training or education or employment status: the highly skilled and educated resident who has never been unemployed is entitled to precisely the same preference as the unskilled, habitually unemployed youth in a job training program. Whether or not it might ever be constitutional for a State to ease its unemployment problems by requiring private employers to discriminate against nonresidents—"a policy which may present serious constitutional questions," *id.*—*Hicklin v. Orbeck* clearly stands for the proposition that it cannot do so through an "across-the-board grant of job preference to all [its] residents." And that is precisely what Boston has sought to do here.

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by the Mayor in issuing the Executive Order, *see* A19-21, nor were they stipulated by the parties to be among the objectives of the Executive Order, *see* A35, nor were they found by the state supreme court to be among the goals of the Order, *see* A7. Moreover, while it is true that nonresident workers can experience delays in traffic and travel commuting to and from work, there is nothing in the record to establish that absenteeism and tardiness by private construction workers is a particular "evil" for the City of Boston, or that nonresidents are a "peculiar source" of this evil.

Conclusion

The commerce clause and the privileges and immunities clause, as construed by this Court, have ensured that our Nation is not divided by the sort of economic warfare between states that led Virginia to call the first Constitutional Convention. The Order which the Mayor of Boston has promulgated, and the approach to alleviating unemployment which the City urges in this Court, are fundamentally inconsistent with those clauses and with our constitutional system. Whatever short-run advantages the Order might produce for Boston residents are far outweighed not only by the hardships that would be imposed on nonresidents, but also by the threat which is posed to our single Union. If Boston is permitted to "close its gates" to deal with its economic problems, then every city and town and state can close theirs as well. That is precisely what the Constitution prohibits—and why it is prohibited.

Respectfully submitted,

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No. 81-1003

IN THE

Supreme Court of the United States

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations in the United States.[1] At present, the Chamber has in excess of 240,000 members, including over 235,000 corporations, partnerships, proprietorships and individuals, as well as over 1,350

[1] This brief is filed with written consent of the parties as required by Rule 36.2 of the Rules of this Court.

trade associations, and 2,800 local and state chamber of commerce.

The Chamber regularly presents its views to this Court and the lower federal courts on issues of broad importance to its members.[2] The issue presented here, whether the Constitution permits a municipality to partially bar non-residents from employment by private contractors on construction projects administered by the city, is of significant interest to the Chamber. In this regard, the Chamber has long supported free trade, both internationally and domestically. Its policy handbook, in fact, states: "The U.S. has a vital stake in promoting measures to achieve the greatest possible relaxation of discriminatory and restrictive trade . . . practices . . ." [3] Moreover that handbook provides that "Government (Federal, State and Local) procurement programs must be consistent with sound business practices, and should strengthen, rather than disrupt, our free market economy." [4]

The Executive Order at issue here is the very antithesis of both these precepts. By establishing a requirement for 50 percent of all employees to be city residents, it necessarily favors local contractors.[5] Such economic protectionism only invites retaliation in kind by other municipalities, as well as states. In the long run such practices serve only to disrupt the free trade among the states upon which the economy of this country is built, and through the disruption of the free market system, can only result in increased costs to the municipalities, and ultimately the taxpayers.

It is for these reasons, that the Chamber respectfully submits this brief.

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[2] See, e.g. *First National Maintenance Corp.* v. *NLRB*, U.S. , 69 L.Ed 2d 318 (1981); *Northwest Airlines* v. *Transport Workers of America, AFL-CIO, et al.*, ____ U.S. ____, 67 L.Ed 2d 750 (1981) (Pet. for cert. only); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980); *U.S.* v. *U.S. Gypsum, et. al.*, 438 U.S. 422 (1978); *Gould Corp.* v. *NLRB*, 612 F.2d 728 (3rd Cir. 1979).

[3] Policy Declarations Adopted by the Chamber of Commerce of the United States, p. 108. (1980).

[4] *Id.* at 100.

[5] App. 37, ¶9(j).

SUMMARY OF ARGUMENT

As found by the Supreme Judicial Court of Massachusetts (425 N.E.2d 346), the Mayor's Executive Order at issue here is patently unconstitutional under both the Commerce (Article I, §8, cl.3) and Privileges and Immunities (Article IV, §2) Clauses of the U.S. Constitution. That order requires that any private contractor employ at least 50% Boston residents on any project which involves any city funds, or any Federal or state funds granted to and expended by the city.

The parties agreed that this order would discourage non-Boston, and non-Massachusetts contractors from bidding on projects covered by the Executive Order (Appendix (App.) 37, ¶9(j)), and result in unemployment of non-residents of the City of Boston, and non-residents of the State of Massachusetts (App. 37, ¶9(i)).

Blatant economic protectionism, and favoring of local residents have been consistently rejected by this Court under both the Commerce, as well as the Privileges and Immunities Clauses. *See, e.g., Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978); *Toomer* v. *Witsell*, 334 U.S. 385 (1948).[6]

In this regard, this Court has consistently held that under the Commerce Clause a state, and, we believe, *a fortiorari*, a municipality, "may not place itself in a position of economic isolation." *Philadelphia* v. *New Jersey*, 437 U.S. at 623 quoting *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-538 (1949). "Thus, where simple economic protectionism is effected by the Legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia* v. *New Jersey* at 624.

Even if this Court should determine that there are legitimate legislative goals behind the Executive Order, it must fall

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[6] Equally implicated is the constitutional right to travel. *See generally, Zobel* v. *Williams*, ____ U.S. ____, 50 L.W. 4613 (June 14, 1982) and *Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969). While not expressly relied on by the court below, the right to travel is derived from one or both of the Commerce, and Privileges and Immunities Clauses. *Compare Zobel* v. *Williams* at 4616 (Justice Brennan, *et al.* concurring) with *Zobel* at 4618-4619 (Justice O'Connor concurring) Inasmuch as both these clauses were considered below, consideration of the right to travel would appear to be appropriate.

on the basis that the means utilized are not reasonably related to the goals, and the burden on interstate commerce is significant. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The invalidity of the Executive Order is even more readily apparent under the Privileges and Immunities Clause. In *Hicklin* v. *Orbeck*, *supra*, this Court found a not dissimilar Alaskan statute violative of the clause. There, this Court formulated a two prong test for analyzing the validity of such local provisions that burden "essential activities" (a category that clearly includes employment): (1) Are non-citizens a peculiar source of the evil at which the statute is aimed, and (2) is there a "substantial relationship" between the evil and the discrimination practiced against the non-citizens? *Hicklin* at 525-527.[7] Applying this standard, the Court must conclude, as did the Massachusetts Supreme Judicial Court, that the statute is invalid.

I. THE EXECUTIVE ORDER IS ECONOMIC PROTECTIONISM THAT IS INCONSISTENT WITH THE COMMERCE CLAUSE

The Mayor's Executive Order at issue here favors local contractors over non-Boston and non-Massachusetts contractors,[8] and favors local citizens over non-citizens.[9] It is, therefore, brazen economic protectionism. As such, it falls within the ambit of the "virtually *per se*" rule of invalidity established in *Philadelphia* v. *New Jersey*, 437 U.S. at 624, and must fall.

But even if the city's contentions are accepted, that there are legitimate legislative goals, it must still show that the means chosen are reasonably related to the goals, and that the burden on interstate commerce is "incidental." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), *quoted with approval, Philadelphia* v. *New Jersey*, at 624.

The Executive Order fails to survive judgment by this standard. Admittedly, unemployment is a legitimate local

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[7] See also, *Zobel* v. *Williams* at 4619 (Justice O'Connor concurring).

[8] App. 37 ¶9(j), App. 44 ¶15(a).

[9] App. 37 ¶9(i), App. 41 ¶15(a).

concern. But it should be remembered that "the evil of protectionism can reside in legislative means as well as legislative ends." The statute (or Order) must be aimed at solving the local problem with as minimal an impact on interstate commerce as is possible. *Pike* v. *Bruce Church, Inc.*, 397 at 142. *Accord, Philadelphia* v. *New Jersey* at 624.

Here the mayor has used a blunderbuss approach, rather than a narrowly focused attempt to solve the local problem. In this regard, the Executive Order is identical to a New York statute found unconstitutional by the Court of Appeals of New York in *Salla* v. *County of Monroe*, 48 N.Y. 2d 514, 399 N.E. 2d 909 (1979). There, the court stated:

> Far from any demonstration of a close relationship between non-resident employment on public works projects and unemployment rolls, there is nothing in this record to connect the two at all. In fact, there is nothing to indicate that an influx of non-residents for any purpose is a major cause of our unemployment. Furthermore, though, simplistically viewed, it of course can be said that every position filled by a Pennsylvania resident is one less job for a New York resident, the statute does not in fact prefer the unemployed over the employed as replacements for dislocated non-residents. For all that it provides, qualified residents may be drawn away from ongoing employments in order to accept what they may regard as the more attractive opportunities thus created, an inconsistency given considerable weight in *Hicklin, supra,* [437 U.S.] at pp. 527-528, 98 S.Ct. 2482.
>
> Nor is section 222 geared to focus efficiently on its goal. Instead, with blunderbuss overbreadth, it makes no distinction between supervisory and non-supervisory employees, giving no consideration at all to the much smaller universe of jobs or of suitable replacements that are in the offing at that level. And, it goes without saying that, even if the New York pool of workers includes persons with qualifications for the openings the statute forces, a project is likely

> to be completed more quickly, more efficiently and more economically under supervisors who enjoy an employer's confidence and who are familiar with its practices. Nor is it to be assumed that the readier coordination between experienced supervisors and a team of tried employees who customarily work together is inconsequential. Such factors may readily give rise to a situation in which the disadvantages of additional expense, inconvenience and organizational disruption are sufficient to deter contractors from bidding on New York public works jobs altogether. The consequences hardly "secure [the] community of intercourse" among the States that is the raison d'etre of the privileges and immunities clause (Lemmon v. People, 20 N.Y. 562, 607).

Salla at 914.[10]

The Mayor's Executive Order contains the same faults as those outlined by the New York Court above. It is "a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents." App. 15. The burden imposed by the Order is, therefore "clearly excessive in relation to the putative local benefits . . ." *Pike* v. *Bruce Church* at 142. The local interest could have been "promoted as well with a lesser impact on interstate activities." *Id.* Accordingly, the Executive Order fails to satisfy the Commerce Clause.

II. THE EXECUTIVE ORDER'S RESTRICTION ON THE EMPLOYMENT OF NON-BOSTON RESIDENTS VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION

The Privileges and Immunities Clause of Art. IV, §2 of the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several

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[10] While the New York court analyzed the statute at issue there solely under the Privileges and Immunities Clause the analysis of whether the statute is narrowly focused on the local problem with as minimal an impact on interstate commerce as possible, is the same. Certainly, it can be said that the raison d'etre of the Commerce Clause was also to "secure the community of intercourse among the States."

States." Concern over exactly the type of economic protectionism instituted by the Mayor of Boston here led to the inclusion of the Clauses' predecessor in the Articles of Confederation. *Salla* v. *County of Monroe*, 399 N.E. 2d at 912.

"The primary purpose of this clause . . . was to help fuse into one nation a collection of independent, sovereign States." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948). And as this Court also stated in *Toomer:* "In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." (footnote omitted) *Id.*

In *Toomer*, this court was faced with a South Carolina statute which taxed out-of-state shrimp fisherman at a significantly higher rate than local fisherman, as well as imposing other restrictions on the out-of-staters. In finding the statute unconstitutional, the Court established the test still applied today for determining whether local regulations comport with the Privileges and Immunities Clause. *See Zobel* v. *Williams*, 50 U.S.L.W. at 4619 (Justice O'Connor concurring).

As a preliminary matter, it must be determined whether the non-resident is seeking to engage in "an essential activity or exercise a basic right." *Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. 371, 387 (1978). The *Toomer* test then provides that in order for the local regulation to be valid, there must be "something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer* at 398, *quoted with approval, Hicklin* v. *Orbeck*, 437 U.S. at 525-526. Then, the Court must find a "substantial relationship" between "the discrimination the Act works against non-residents" and the "evil" they are said to present. *Hicklin* at 527.

Application of this test to the Mayor's order leads to the inexorable conclusion that it is unconstitutional. As an initial matter, it has been clear for over a century that the right to engage in one's trade is a fundamental right guaranteed by the Privileges and Immunities Clause. *Ward* v. *Maryland*, 12 Wall 418, 430 (1871); *Hicklin* at 523-527.

Next, it must be determined whether non-residents of Boston are the peculiar source of the evil (unemployment) at which the executive Order is aimed. As in *Hicklin*, where this Court struck down an Alaskan statute which gave a flat preference to Alaskan residents, there is no evidence that an influx of non-Boston residents is a cause of the city's high unemployment. *Hicklin* at 526-527. *Salla* v. *County of Monroe*, *399 N.E. 2d at 914.*[11]

Finally, there is no relationship between the purported evil that the non-Boston residents present and the discrimination the Act works against them. In this regard, the Executive Order contains the identical fault found by this Court with the Alaskan statute at issue in *Hicklin*. There, the Court stated:

> [The statute] . . . simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act.
>
> * * *
>
> If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against non-residents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely detailed to aid the unemployed the Act is intended to benefit.

Hicklin at 527-528;[12] *Salla* v. *County of Monroe*, at 914.[13]

Petitioner summarily dismisses any alleged invalidity of the Executive Order under the Privileges and Immunities Clause on the basis that the order discriminates against some Massachusetts' citizens, as well as citizens of the other 49 states. (Pet. Br. p.24) Petitioner's argument is without merit. The

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[11] See quote, *supra* at 5.

[12] In *Hicklin* this Court strongly suggested that a state can never require private employers to discriminate against non-residents citing *Ward* v. *Maryland* 12 Wall 418.

[13] See, supra pp. 5-6.

order totally excludes non-residents of Massachusetts while only excluding *some* citizens of that state. Thus, it favors Massachusetts citizens while placing citizens of other states at a disadvantage. That is exactly the evil at which the Privileges and Immunities Clause was aimed. *Toomer*, at 395. That simply is not the case here.

In any event, it is difficult to imagine that the founding fathers in their attempt to "fuse into one nation a collection of soverign independent States" (*Id.*), intended to allow municipalities to discriminate in a manner in which the states were prohibited. In this regard, the instant case is analogous to those arising under the Fourteenth Amendment where this Court has held that in acting in a legislative manner, cities "wield state power." *Hunter* v. *Erickson*, 393 U.S. 385, 389 (1969).

Nor is there any merit to Petitioner's argument that this case is distinguishable from *Hicklin* on the basis that the Alaska law at issue there dealt with oil and gas reserves of "profound national importance", which enjoys no parallel here. Again, that is simply not the case. By its very terms, the Executive Order applies to Federal funds, as well as state and local funds, which we submit is a close parallel.

CONCLUSION

For all the foregoing reasons, the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts should be affirmed.

Respectfully submitted.

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JUL 2 1982

No. 81-1003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC., *Petitioners*,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO AS AMICI CURIAE

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Respondents.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

---

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

The American Federation of Labor and Congress of Industrial Organiaztions and the Building and Construction Trades Department, AFL-CIO, respectfully move

this Court for leave to file the accompanying brief *amici curiae* in support of the position of respondents in this case.

INTEREST OF THE AMICI CURIAE AND THE ISSUES COVERED IN THEIR ATTACHED BRIEF

The AFL-CIO is a federation of 102 national and international unions representing 13,000,000 working men and women. The Building and Construction Trades Department, AFL-CIO, is composed of 15 national and international unions representing 4,000,000 construction workers. This case concerns the efforts of Boston to close off construction jobs in that City to nonresident craftsmen. The term "journeymen" commonly used to refer to skilled construction workers is no misnomer; it accurately reflects the historic mobility, safeguarded by the Commerce Clause, of those who follow these trades. The *amici curiae*'s interest in this case is to maintain that historic right.

We show in point I of our brief that this case is on the "market regulator" side of the line drawn by *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 and *Reeves, Inc.* v. *Stake*, 447 U.S. 429, and on the private entity side of the line drawn by *McCarthy* v. *Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, and *National League of Cities* v. *Usery*, 426 U.S. 833. The Order is therefore subject to Commerce Clause scrutiny and to invalidation under *Philadelphia* v. *New Jersey*, 437 U.S. 618, 624. In point II we show that the Executive Order violates the right of residents of states other than Massachusetts under the Privileges and Immunities Clause of Art. IV, § 2, as construed in *Hicklin* v. *Orbeck*, 437 U.S. 518, which is controlling here.

CONCLUSION

For the above stated reason this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

An absolute immunity for the use by the states and localities of their economic power as a lever to balkanize the free common market this Nation was founded to create would seriously undermine the constitutional guarantees written into the Commerce Clause and the Privileges and Immunity Clause. Heedless of those consequences, petitioners' argument for the constitutionality of the Executive Order granting a preference to Boston residents on construction financed, to any extent, or administered by the City proceeds by transmuting the carefully guarded opinions in *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, *Reeves, Inc.* v. *Stake*, 447 U.S. 429, *McCarthy* v. *Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, and *National League of Cities* v. *Usery*, 426 U.S. 833 into a full blown doctrine of an absolute privilege in the states and localities to impose any condition on contractors doing work for a government entity—including conditions on how those private businesses deal with others —free and clear of the Commerce Clause.

We show in point I of our brief that these decisions on their own terms do not push to that result and that in light of the compelling countervailing values embodied in the Commerce Clause the lesson of *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 127 is very much in point:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

And we then show that this case is on the "market regulator" side of the line drawn by *Alexandria Scrap* and *Reeves* and on the private entity side of the line drawn by *National League of Cities*, and that the Executive Order is therefore subject to Commerce Clause scrutiny.

Since the Commerce Clause is applicable it is clear that the court below correctly struck down the Executive Order. For, "simple economic protectionism" is subject to "a virtually *per se* rule of invalidity * * *" (*Philadelphia* v. *New Jersey*, 437 U.S. 618, 624; see also *Sporhase* v. *Nebraska ex rel. Douglas* (No. 81-613; July 2, 1982) sl. op. p. 16.) Petitioners' protestations that the Order is "non-protectionist" are belied by its text and stipulated objects and effects. And of course "[i]t is immaterial that" Massachusetts workers and enterprises from outside the Boston area are "subjected to the same proscription as [those who are engaged] in interstate commerce." (*Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354, n. 4.)

In point II we show that the Executive Order violates the right of residents of states other than Massachusetts under the Privileges and Immunities Clause of Art. IV § 2. *Hicklin* v. *Orbeck*, 437 U.S. 518, is controlling. Petitioners' efforts to distinguish *Hicklin* are uniformly without substance, indeed, those efforts are inimical to the philosophy of the Constitution.

ARGUMENT [1]

I. THE CHALLENGED EXECUTIVE ORDER IS INVALID UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

A. Petitioner's principal argument is that under *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, and *Reeves, Inc.* v. *Stake*, 447 U.S. 429, the Executive Order here is immune from Commerce Clause scrutiny. Petitioners put the point thusly: "When acting as market *participants* rather than market *regulators*, state and local governments are free to 'favor [their] own citizens over others' unimpeded by the Commerce Clause and its negative implications." (Pet. Br. 14, emphasis in original.) And petitioners elaborate that point by arguing that "the challenged action involves only the City's choice of 'how, with whom and for whose benefit to deal,' *Reeves*, 447 U.S. at 438 n.10" and that the "municipal decision here * * *

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[1] For the reasons to be stated in the text we believe that the Boston Executive Order is clearly violative of the United States Constitution. As an *amicus curiae*, however, the AFL-CIO regards it as incumbent to note that decision of the federal constitutional questions under the Commerce and Privileges and Immunities Clauses would be unnecessary if the state courts were to decide that the order is violative of the Massachusetts Constitution. The Supreme Judicial Court of Massachusetts expressly reserved that question (Pet. App. a, n. 19). If the Court believes that the federal constitutional issues should not be decided until it has been determined whether Boston's discrimination against non-Bostonian residents of Massachusetts violates the State Constitution, a method is available for obtaining a decision of that state law question from the court below. This Court has noted that "the Supreme Judicial Court of Massachusetts has adopted a Rule of Court under which an issue of interpretation of Massachusetts law may be certified directly to that court for prompt resolution. Mass. Rules of Court, Sup. Jud. Ct. Rule 3:21 (1976)." *Belotti* v. *Baird*, 438 U.S. 132, 150. "This Court has utilize[d] certification procedures in the past * * *" (*id.* at 151). See *Dresner* v. *Tallahassee*, 375 U.S. 136; *Aldrich* v. *Aldrich*, 375 U.S. 75, 249. The Court may consider it appropriate to do so here to avoid what may be the unnecessary decision of federal constitutional issues.

differs, if at all, in character from that in *Reeves* * * * in only two respects * * * [both of which] cut in exactly the wrong direction so far as the decision below [concluding that *Reeves* does not control] is concerned." (Pet. Br. 15, 16.)

Nothing in *Alexandria Scrap* or *Reeves* announces the far-reaching doctrine that the states are free to impose any and all conditions on their offers to deal unimpeded by the Commerce Clause. Given the novelty of the states' claims for immunity, and the potential impact of such an immunity, both opinions go no further than to conclude that on the facts before the Court the state could properly be characterized as a "market participant" and do so without giving a definitive meaning to that inherently elusive phrase. And petitioners do not begin to do business with the fact that the Boston Executive Order is decisively different in two respects "that cut in exactly the [right] directions so far as the decision below is concerned" (Pet. Br. 16), from the government action at issue in those two cases.

In *Alexandria Scrap* and *Reeves* the restriction imposed—that the private party dealing with the state be a citizen of the state—affected only the market in which the state was participating and the state's entry into that market was financed entirely by its own funds. Neither Maryland nor South Dakota sought to leverage its participation in one market to control the actions of private parties in another market; nor was either state using its market participation to set rules that limited access to opportunities financed in part by others. The Boston Executive Order is different in kind, as we now show.

First, the Executive Order here is not limited to imposing conditions that affect only the market—that for general contractors' services—in which Boston participates; that Order dictates the terms of relationships between private general contractors and private subcontractors and between private contractors at all levels and

their employees. Thus, in this case, in contrast to *Alexandria Scrap* and *Reeves*, there is government action aimed at setting the rules to be observed by the factors who deal with each other in markets *in which that government is not a direct participant.* And, of course, the restrictions imposed on the workings of these "secondary" markets are not aimed at advancing Boston's "proprietary" interests as a "market participant"; the purpose of those restrictions is to advance the same social interests that would be advanced by issuing an order requiring private employers doing business in Boston to hire Boston residents at the pain of a civil or criminal sanction. It strains the normal meaning of words to the breaking point to characterize as that of a simple "market participant", conduct so far removed from the norms of commercial behavior and so close to those of the government acting as a regulator of private markets.

Moreover, and again in contrast to *Alexandria Scrap* and *Reeves*, the conditions that Boston imposes on entry into these markets in which the City itself does not participate are not limited to transactions funded entirely by the City. The Executive Order applies to "any construction projects funded in whole or in part by City funds, or funds which, in accordance with a federal grant, or otherwise, the City expends or administers" (Pet. App. A 20). Thus the Executive Order shuts non-Bostonians out of a market created in part by the taxes paid by those non-Bostonians to other governments.

Petitioners criticize the court below for relying on "the presence of non-local revenue sources;" they declare this to be "constitutionally immaterial not only to *whether* the Commerce Clause applies but to *what its application would entail*" (Pet. Br. 15, n. 45, emphasis in original), and cite the Massachusetts Court's recognition "that the '[t]he goals of . . . the executive order [include 'ensur[ing] that the expenditure of local funds results in maximum benefits to the locality *where the monies* are raised.'" (Pet. Br. 15, n. 45, quoting Pet. App. A 7,

petitioner's emphasis). To the extent that construction is financed partially by federal or other "non-local" funds those "*monies are raised*" in more than one locality, and the Executive Order provides "maximum benefits" to only one of these localities—Boston. To be sure, "the City's interest in conserving for its residents a fair share [as it has unilaterally determined what is fair] of the benefits generated by a City-administered program funded with 'taxes paid by [the City's] residents' * * * is manifestly independent of whether such taxes are paid entirely to, and thus channeled wholly through, the City's revenue authorities, or are paid partly to, and thus channeled partly through, the revenue authorities of the State and Federal Governments as well." (Pet. Br. 15, n. 45, omitting citations to Executive Order). *But the equity and the constitutional legitimacy* of Boston's attempt to maximize that interest are severely discredited by the fact that the Order discriminates against individuals and corporations who are non-residents of Boston but have paid taxes to Massachusetts and to the United States. Petitioners' effort to portray the state and federal treasuries as mere conduits through which the taxes of Bostonians are "channeled" can momentarily distract attention from, but cannot change, this reality.

In sum, the court below correctly relied on the fact that Boston is the beneficiary of federal appropriations that are made possible by the taxes paid by individuals and other entities throughout the United States. For this fact confirms our submission "that Boston's challenged contract policy would * * * redistribute fiscal (or other) resources improperly in Boston's direction." (Pet. Br. 15, n. 45).[2] More fundamentally, it is incontrovertible evi-

[2] Petitioners' denial (*id.*) that there is even a "suggestion of such an impermissible effect" is incomprehensible: The entire controversy here is whether "Boston's challenged contract policy" that would "redistribute resources in the form of jobs and business opportunities to Boston residents and those who would give them hiring preference" (*id.*) is inconsistent with the federal Constitution. That redistribution is the openly avowed object and effect of the Executive Order.

dence of the interdependence of all persons and enterprises in all localities and states that form this Nation. The Commerce Clause recognizes and sustains that interdependence. That Clause denies Boston the right to reserve to itself the benefits made possible by the taxes of all. (See, *e.g.*, *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 523.)[8]

In both the respects just detailed the Executive Order here has a broader and more intrusive effect on interstate commerce—and an effect at best tenuously related to the government entity's interests as a "market participant"—than the government actions at issue in *Alexandria Scrap* and *Reeves*. And these effects cut to the heart of the "system[] fostered by the Commerce Clause —that is designed to assure—that * * * every craftsman * * * will have free access to every market in the Nation." (*H.P. Hood & Sons* v. *Du Mond*, 336 U.S. at 539 quoted in *Alexandria Scrap*, 426 U.S. at 808.) The premise of that Clause, as stated once again in *Alexandria Scrap*, is that "this nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand," (426 U.S. at 803). Those large purposes preclude the grant of Commerce Clause immunity Boston seeks in this case.

B. Petitioners' secondary argument for Commerce Clause immunity rests on *McCarthy* v. *Philadelphia Civil Serv. Comm'n.*, 424 U.S. 645 and *National League of Cities* v. *Usery*, 426 U.S. 833. Petitioners contend that the lesson of these decisions should be extrapolated as follows:

> The court below recognized, as it had to in the light of *McCarthy* v. *Philadelphia Civil Service Commis-*

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[8] Petitioners' further argument beginning "Second" (Pet. Br. 18, n. 45, emphasis in original) is merely diversionary. That there "is no suggestion here that Boston's challenged contract policy is contrary to any condition imposed by Congress on the use of federal funds" (id.) does petitioners no good. For the issue is whether that policy violates the Constitution itself.

> *sion*, *supra*, that a city is free of federal constitutional inhibition when preferring its own residents "in at least certain kinds of direct hiring." But a city government's choices between relying for its public works projects on job-specific, short-term employees and relying for such projects on employees hired for long periods—or between hiring employees for such public works projects through private contractors and doing so directly—obviously involve the internal structuring of functions too traditionally governmental and at a level too basic, to permit federal intrusion even by Congress itself absent a clear showing of necessity. *See National League of Cities* v. *Usery*, *supra*, 426 U.S. at 848 (interest in local sovereignty includes city's freedom to hire on "casual" basis rather than relying on permanent city employees). [Pet Br. 19-20; footnote omitted.]

This airy rejection of the heretofore dispositive significance of the distinction between a city setting the terms and conditions of employment of the *city's employees* and a city determining how a private employer will set the terms and conditions of employment of that *private employer's employees* in determining the scope of the Commerce Clause cannot be squared with this Court's decisions. As the Court explained in *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264:

> [The *National League of Cities* Court] began by drawing a sharp distinction between congressional regulation of private persons and businesses" "necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside," *id.* at 845, and federal regulation "directed, not to private citizens, but to the States as States," *ibid.* As to the former, we found no Tenth Amendment impediment to congressional action. [425 U.S. at 286.]

And, in *Hodel* the Court added:

> The Court in *National League of Cities* held that the power to set the wages and work hours of state employees was "an undoubted attribute of state sovereignty." *Ibid.* And because it further found that the

> challenged regulations would "displace the States' freedom to structure integral operations in areas of traditional governmental functions," *id.* at 852, the Court concluded thta Congress could not, consistently with the Tenth Amendment, "abrogate the States' otherwise plenary authority to make [these decisions]." *Id.* at 846. [452 U.S. at 287.]

Given that "sharp distinction," private citizens and business are not the "state[] as [a] [state[]" and, contrary to petitioners' supposition, state and local governments do not have "plenary authority" unrestrained by the Commerce Clause to determine the basis on which private entities treat with their employees. Indeed on two occasions during this Term in which the issue posed was closely analogous to that here the Court has emphasized that the constitutional rules governing the state as state are distinct from the rules governing private businesses doing work for the state.

First, in *United States* v. *New Mexico*, —— U.S. ——, 50 L.W. 4326, 4330 (March 24, 1982) where the issue was the scope of the federal government's immunity from state taxation the Court held:

> [I]mmunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. * * * And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, * * * even if the private entity is using the Government property to provide the United States with goods, * * * or services. * * * In such a situation the contractor's use of the property "in connection with commercial activities carried on for profit," is "a separate and distinct taxable activity." *United States* v. *Boyd*, 378 U.S., at 44.

By the same token the contractors and subcontractors employed by Boston cannot be equated with Boston itself.

Second, in *Rendell-Baker* v. *Kohn*, —— U.S. ——, 50 L.W. 4825 (June 25, 1982) which raised the question of

"whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees" (*id.* at 4827), the Court again emphasized the decisive difference between the government and its contractors:

> The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts. [*Id.* at 4828.]

B. Once it is determined that *Alexandria Scrap*, *supra*, and *Reeves*, *supra*, do not provide Boston's Executive Order with an escape hatch from the Commerce Clause, the invalidation of that Order is inevitable. Our discussion of this point can be brief, because the governing principle was emphatically reaffirmed and applied quite recently in *Philadelphia* v. *New Jersey*, 437 U.S. 617:

> The bounds of these restraints [imposed by the Commerce Clause itself] appears nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose. That broad purpose was well expressed by Mr. Justice Jackson in his opinion for the Court in *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 537-538:
>
> > "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig*, 294 U.S.

> [511], 527, what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'"

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. See, *e.g.*, *H. P. Hood & Sons, Inc.*, v. *Du Mond*, *supra*; *Toomer* v. *Witsell*, 334 U.S. 385, 403-406; *Baldwin* v. *G. A. F. Seelig, Inc.*, *supra*; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316 [437 U.S. at 623-624]

Petitioners would avoid the "virtually *per se* rule of invalidity" by characterizing the Executive Order as a "*non*-protectionist measure[]" (Pet. Br. 22, emphasis in original). See also Pet. Br. 21, asserting "the order's facially non-protectionist structure and the non-protectionist aims and effects revealed by this record * * *." Petitioners' "non-protectionist" characterization is belied by the terms of the Order itself,[4] its avowed objectives[5]

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[4] As it is not quoted in petitioners' Statement of the Case, we here set forth in full Par. 1 of the Order:

> (1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:
>
> a. at least 50% by bona fide Boston resident;
>
> b. at least 25% by minorities;
>
> c. at least 10% by women.

[5] It was stipulated below that the "objectives of the residency aspects of the Executive Order include:"

and its effects.[9]

That the Boston Executive Order is "protectionist" under this Court's understanding of that concept and is

---

(a) The promotion of the employment of residents of the City of Boston and the concomitant alleviation of the unemployment of Boston residents.

(b) The reduction in the level of economic and social costs to the City of Boston, which have an adverse multiplier effect, arising from the unemployment of residents of the [*sic*] Boston.

(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax dollars and federal grants and entitlements within the city's economy.

(d) Ensuring that Boston residents receive some direct benefit from public works projects funded in part by federal, state and city taxes paid by Boston residents. [Pet. App. A. 35.]

The City also asserts:

8. If necessary, the City would introduce testimony from City Officials to the effect that a purpose of the residency aspects of the Executive Order includes the alleviation of the aggravation of racial tension in the City arising out of a perceived favoritism for minorities in previous City affirmative action efforts. [Pet. App. A. 36.]

[9] Most, although not all of the stipulated effects of the residency aspects of the Executive Order are to prefer Bostonians and the Bostonian economy and to exclude outsiders:

(a) The promotion of the employment of residents of the City of Boston and the concomitant alleviation of the unemployment of Boston residents.

(b) The reduction in the level of economic and social costs to the City of Boston, which have an adverse multiplier effect, arising from the unemployment of residents of the [*sic*] Boston.

(c) The generation of secondary economic activity and tax revenues resulting from the retention, by virtue of construction employment of residents, of state and local tax

unconstitutional is clear from *Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 626-627:

> Th[e] dispute [here] about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow *of all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of

---

dollars and federal grants and entitlements within the city's economy.

(d) Ensuring that Boston residents receive some direct benefit from public works projects funded in part by federal, state and city taxes paid by Boston residents.

* * * *

(g) An increase in the skills, competence and experience of those Boston residents who are actually referred for employment by virtue of the Executive Order and who would not normally have been working on public construction projects.

* * * *

(i) Unemployment of certain construction workers who are non-residents of the City of Boston and non-residents of Massachusetts who otherwise would have been employed on projects to which the Executive Order has been applied.

(j) Discouragement of some contractors located outside the City of Boston and some contractors located outside the Commonwealth of Massachusetts from bidding on public construction work resulting in higher costs of public construction because of fewer competitive bids. [Pet. App. 36A-37A.]

> commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.

See also *Sporhase* v. *Nebraska ex rel. Douglas*, (No. 81-613; July 2, 1982) reaffirming that " 'strictest scrutiny' [is] reserved for facially discriminatory legislation." Sl. Op. p. 16.

With respect to the Commerce Clause issue in this case it remains only to recall the Court's holding in *Dean Milk Co.* v. *Madison*, 340 U.S. 349:

> It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce. Cf. *Brimmer* v. *Rebman*, 138 U.S. 78, 82-83 (1891). [340 U.S. at 354, n.4].

Petitioners attempt to avoid this precedent through the same kind of Orwellian abuse of language by which they seek to brush aside *Philadelphia* v. *New Jersey*, *supra*. Petitioners say that Dean Milk "is immaterial where, as here, *no discrimination* is established in the first instance" (Pet. Br. 22, n.58, emphasis in original). If it were true that "here, no discrimination is established in the first instance" (*id.*), petitioners' proffered distinction might well be valid. But, of course, it is not true. Discrimination in favor of Boston residents is what the Executive Order—and so this case—is all about. (See pp. 12 to 14, ns. 4 to 6, *supra*). If a hiring preference in favor of one class or group on the basis of their residence is not "discrimination" in the Commerce Clause sense, what does that word mean? [7]

---

[7] Petitioners' discursive description of the underlying details of *Dean Milk* cannot limit its holding. The Court in its opinion did not even mention, let alone rely on many of these details, including the statement that "the ordinance effectively served to bar only Dean Milk Co., a large Illinois firm." (Pet. Br. 22, n. 58). This is not to say that petitioners' description is inaccurate, but rather that it is far removed from the *ratio decidendi* of the case.

It is startling that petitioners should invoke, in support of this Executive Order, the principle that the "presence of significant

II. THE CHALLENGED EXECUTIVE ORDER IS INVALID UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF ART. IV, SECTION 2 OF THE CONSTITUTION.

Insofar as it prefers residents of Boston to those who reside outside of Massachusetts, the Executive Order under review also violates the Privileges and Immunities Clause of Article IV, § 2 of the federal Constitution. In *Hicklin* v. *Orbeck*, 437 U.S. 518, the Court struck down as violative of this provision an Alaska statute ("Alaska Hire") requiring "that 'all oil and gas leases, easements or right-of-way permits for oil or gas pipepline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party' contain a provision 'requiring the employment of qualified Alaska residents' in preference to nonresidents." (*Id.* at 520). The *Hicklin* Court reaffirmed that the purpose of the Clause is:

> "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to

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burdens 'within as well as without the states' provides its own political 'safeguard against . . . abuse.' " (Pet. Br. 22, n.58, quoting *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 187 and also citing *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 783). Since nonresidents are quite properly barred from voting in Boston's mayoral elections there is no "political 'safeguard against . . . abuse' " (Pet. Br. 22, n.58) in the framing of Executive Orders that create this form of preference for City residents. Similarly, there would be no political safeguard against such residential preferences being adopted by any political subdivision in Massachusetts or elsewhere in the United States.

> them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." [438 U.S. at 524, quoting *Paul* v. *Virginia*. 8 Wall. 168, 180.

See also 437 U.S. at 524-526, discussing *Ward* v. *Maryland*, 12 Wall. 418; *Toomer* v. *Witsell*, 334 U.S. 385 and *Mullaney* v. *Anderson*, 342 U.S. 415. The Court observed that under *Ward*, the assumption "that a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against non-residents" is "at least dubious" (437 U.S. at 526). But even under that assumption it was deemed "clear that under the *Toomer* analysis reaffirmed in *Mullaney*, Alaska Hire's discrimination against non-residents cannot withstand scrutiny under the Privileges and Immunities Clause." (*Id.*). The reason is that the Alaska Hire Act failed to satisfy what petitioners correctly described as "a requirement of close fit" (Pet. Br. 25) between the statute and its object. (See 437 U.S. at 526-528.)

Before considering petitioners' attempt to show that the Executive Order satisfies the *Hicklin* standard (Pet. Br. 25-28) we shall briefly address their efforts to differentiate this case from *Hicklin* (*id.*, pp. 24-27). First, petitioners say that "as the court below necessarily concedes, the executive order is *not* a discrimination against out-of-state residents; thus the heightened scrutiny of Article IV, § 2, simply does not apply." (*Id.*, p. 24, footnote omitted, emphasis in original). The opinion below neither "concedes" nor decides any such proposition. Rather, the court below said that "it may be more difficult to find a violation of the privileges and immunities clause because one discrimination adversely affects citizens of the Commonwealth, as well." (Pet. App. A. 14, see also A. 13).[8]

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[8] Indeed, in reserving this question the court below cited *Construction & Laborers' Local 583* v. *St. Paul*, 270 Minn. 427, 431

Petitioners felt need to rely on a purported concession (which even if made would not have been binding on respondents or this Court), rather than on reason, in support of their argument that Article IV, § 2 is inapplicable, is understandable. Given "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV and the Commerce Clause" (*Hicklin*, *supra*, 437 U.S. at 531), what was decided in *Dean Milk Co.* v. *Madison*, quoted at p. 15, *supra*, is probably dispositive on this point.[9]

Moreover, the Privileges and Immunities Clause could be readily nullified if a state law were immunized from scrutiny thereunder because the law discriminated against some citizens of that state and all citizens outside the state. For example, we cannot believe that the Alaska Hire Act would have been saved if residents of Fairbanks had been subjected to the same proscription as non-Alaskans. And if Massachusetts law authorizes Boston to adopt its Executive Order discriminating against non-Bostonians both in and outside the Commonwealth (as we must assume for present purposes, since the Massachusetts Court reserved that state law issue, see p. 4, n. 1, *supra*) every other local subdivision could do likewise, thereby excluding non-residents of Massachusetts from all public construction projects.

Petitioners' identification of "the basic flaw in the Alaska statute", and attempt to distinguish that statute from the Executive Order (Pet. Br. 24-25) is

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[134 N.W. 2d 26, 30], invalidating partially on Privileges and Immunities grounds, a city ordinance requiring contractors on public building projects to hire only residents of the county in which the city is located.

[9] We recognize that the two Clauses are not congruent—for example, both protect individuals, but only the Commerce Clause protects corporations. But given the broad purpose of the Privileges and Immunities Clause there can be no reasoned basis for giving those who are protected by that Clause less protection thereunder than under the Commerce Clause.

equally unsound. The basic flaw—on the "dubious" assumption that the state could validly alleviate unemployment by excluding non-residents—was that the statute was overbroad to achieve that purpose. That is the thrust of 437 U.S. at 526-528, to which petitioners do not refer. The pages to which petitioners do refer (437 U.S. at 530-533) were a portion of the Court's response to the state's argument (based on *McCready* v. *Virginia*, 94 U.S. 391) "that because the oil and gas that are the subject of Alaska Hire is *owned* by the state, this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and takes the Act totally without the scope of the Privileges and Immunities Clause." (437 U.S. at 528, footnote omitted, emphasis in original). That line of argument is not even open to Boston, since public jobs are not a "resource" as that word is used in *McCready*, *supra* and its progeny.

We turn finally to petitioners' claim that "even if the executive order *were* subject to a requirement of close fit akin to that applied in *Hicklin*, the order's extension of a hiring preference to Boston residents who are not *themselves* unemployed or underemployed in no way establishes even that the order is ill-suited to reducing joblessness—much less that the order too loosely fits the *mix* of objectives it is designed to serve." (Pet. Br. 25, emphasis in original).

(a) Boston's preference for its residents "who are not *themselves* unemployed or underemployed" is indistinguishable from Alaska's flat employment preference for "all Alaskans regardless of their employment status, education or training * * *." (437 U.S. at 527).

(b) The avowed objective of "reduction of absenteeism and tardiness by commuting construction workers" is not, we think, of sufficient importance to permit discrimination against non-residents. But we need not pursue the point, because the Order is both over and underinclusive to achieve that objective. There is no showing that non-

residents of Massachusetts are more prone to tardiness and absenteeism than residents of Boston; moreover, the superficially plausible notion that residents of the City would find it easier to come to work on time on projects located within Boston takes no account of the possible distance between Bostonians' homes and the construction sites, and the availability of private and public transportation to non-residents. And even if this objective is a legitimate interest of the City—rather than the timely completion of projects by the contractors—the same result could be achieved without residential discrimination by requiring the contractor to impose heavy penalties up to discharge on the absent and the tardy.

(c) The objective of "increasing local participation in and commitment to city projects" (Pet. Br. 26) cannot justify Boston's discrimination if the Privileges and Immunities Clause is to provide any protection to nonresidents. "[L]ocal participation" is merely a euphemism for the discrimination itself; nor can the residents of a city or other community bootstrap themselves into an otherwise unconstitutional preference by increasing their "commitment" if outsiders are excluded. (Cf. *Brown* v. *Board of Education*, 349 U.S. 294, 300, quoted *infra*.)

(d) Petitioners' various arguments based on racial considerations (Pet. Br. 26) are best considered together. Insofar as the Order is designed to aid blacks and other minorities it is flagrantly ill-suited to the purpose since it prefers white Bostonians to black and other minority residents of surrounding states.[10] And the asserted reason for preferring *white* Bostonians—"alleviating racial tensions arising out of perceived favoritism for minorities in past affirmative action efforts" (*id.*) is totally unacceptable. For even as "it should go without saying that the vitality of these constitutional principles [that racial

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[10] The Order makes no exception for non-Bostonian contractors who do not discriminate against minorities or even have "affirmative action" programs, or are themselves minority-owned.

discrimination in public education is unconstitutional] cannot be allowed to yield simply because of disagreement with them" (*Brown* v. *Board of Education*, 349 U.S. 294, 300), so the resistance of some white residents of Boston to the City's remedies for past employment discrimination (the constitutional predicate for "affirmative action") cannot entitle these residents to an employment preference over blacks and other minorities who happen to reside elsewhere. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities". (*Shelly* v. *Kraemer*, 334 U.S. 1, 22.) The racial considerations underlying the Executive Order cannot possibly justify that Order under the Privileges and Immunities Clause; rather they may be a basis for its invalidity under the Equal Protection Clause as well.

Petitioners conclude with a fervent plea that Boston's Executive Order be sustained as a response to a "unique set of problems [that] presents a contemporary challenge to city governments * * *" (Pet. Br. 27). Perhaps it is a sufficient answer that other cities, faced with no lesser problems than Boston, have not adopted its discriminatory policies—although they may have little economic or political choice but to retaliate in favor of their residents if petitioners prevail here. But petitioners' impassioned dialectics are subject to far more fundamental objection. Those who gained their independence through revolution also "live[d"] in desperate times" (Pet. Br. 27); we were told that they tried men's souls. They succeeded, because they had joined thirteen independent colonies into a confederation. After peace came they saw that it was not enough: a more perfect Union was needed, and they formed this Nation. In so doing they rejected for all times the "zero-sum" theory of society, that "every group's gain is, by and large, another's loss." (Pet. Br. 27.) Rather, "the Constitution was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

(*Hicklin* v. *Orbeck*, *supra*, 437 U.S. at 534, quoting *Baldwin* v. *Seelig, Inc.*, *supra*, 294 U.S. at 523 (Cardozo, J.).)

CONCLUSION

For the above stated reason the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

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PETITIONERS,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF *AMICUS CURIAE* OF NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, IN SUPPORT OF RESPONDENTS

Statement of Interest of Amici Curiae

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts, for the purpose of engaging in litigation on matters affecting the economic and constitutional interests of the people and businesses of New England. NELF has long been interested and involved in the constitutional and public policy issues surrounding the proper roles of the states vis-a-vis the federal government and each other. The Foundation has consistently supported the proposition that it is essential to the maintenance of our Federal Union that no State, nor any of its political subdivisions, may possess the power to impose economic barriers to the free flow of interstate commerce, or to adopt protectionist measures designed to favor local citizens at the expense of its neighbors.

Associated General Contractors of America (AGC) is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year. AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the Congress, the Executive Branch and independent regulatory agencies of the Federal Government.

The National Electrical Contractors Association is the national trade organization for the electrical construction industry. The Association is based in Washington, D.C., and currently has over 6,600 members belonging to 135 chapters.

Since its creation in 1901, the Association has served the industry by providing a wide range of management and technical services to its members, and has advocated the interests of electrical contractors to all levels of government, to other segments of the construction and electrical industries, and to the general public.

The *amici* believe that equality of economic opportunity is a right fundamental to achieving the unity of purpose and freedom of enterprise which are central to our democratic form of government, and which are embodied in the Commerce Clause and the Privileges and Immunities Clause of the Federal Constitution. The denial of employment opportunity based solely upon the circumstance of residence violates these vital constitutional guarantees.

The construction trades are particularly threatened by a residency-based hiring preference or quota as is established by the City of Boston Executive Order. The business of construction relies upon a work force which is both highly specialized and skilled and is necessarily mobile. Its mobility is dictated by the irregular nature of the work itself. And the limited availability of construction work within any single municipality requires the construction worker — particularly if a skilled specialty worker — to commute to varying job sites which shift continually upon completion of each project. To impose a residency requirement upon a construction worker would eliminate a significant measure of his employment opportunities. And to demand of construction contractors a hiring quota based upon residence would necessitate a separate work force in each locality, at an unavoidable increase in the cost of construction and at the inevitable expense of the quality of the finished construction project, all due to a mandate to hire with regard not to qualification, but to residence. The *amicus* parties oppose this intrusion upon long-recognized and vital constitutional guarantees.

Introduction and Summary of Argument.

The Court is here presented with the question of whether any municipality — or, by extension, any State of which the municipality is a creature — may by indirection impose a restraint upon interstate commerce and the employment opportunities of nonresidents which by direct action would clearly violate the Federal Constitution. Neither the City of Boston nor the Commonwealth of Massachusetts may constitutionally require that all private contractors hire only local residents, or that any given portion of private construction jobs be reserved for local residents. Yet the Executive Order seeks to accomplish just that result with respect to a significant percentage of the construction work within the City of Boston, by conditioning its award of a construction contract or its approval of a federal incentive grant upon the agreement of private parties to effectuate the City's unconstitutional purpose.

The Executive Order establishes a mandatory quota for the employment of Boston residents on every construction project in connection with which the City expends or administers its own or federal funds.[1] On each such project, and by each

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[1] The Order is set forth in full at A19-A21 (record references are to the Appendix to the Petition for Writ of Certiorari). In relevant part, it states the following policy:

"(1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

a. at least 50% by bona fide Boston residents;
b. at least 25% by minorities;
c. at least 10% by women."

The minority preference of paragraph b. and the gender-based preference of paragraph c. are *not* being challenged herein.

craft, at least 50% of the worker hours must be performed by bona fide Boston residents. Four points are worthy of particular note. *First*, neither the Order on its face nor the implementing measures makes reference to job qualifications.[2] The 50% quota, therefore, must be met without regard to the level of skill of the job applicant. The contractor must hire according to the applicant's residence, and then provide him the training necessary to render him of some use on the workforce. The inevitable result of such a measure is to increase the cost of doing business for a contractor who performs work within the scope of the Executive Order. Agreed Statement of Facts (hereinafter "Facts"), para. 9(k), A37. *Second*, the Order applies not only to public works construction projects financed solely by the City, but also to private development projects induced by federal funds which the City merely administers. *Third*, the Order mandates not simply a *preference*, but a *quota*, a measure even more intrusive of personal rights. A quota demands that a contractor affirmatively recruit employees satisfying the residence requirement, rather than merely give preference to a Boston applicant over an equally qualified nonresident. And *fourth*, the Order's minority hiring provision is *not* challenged by this litigation, and the City's stated purpose of encouraging minority employment is therefore not threatened.

This is not a case wherein a municipality is determining the dispensation of governmental benefits according to appropriately drawn distinctions. It is, instead, an instance of governmental intrusion into the contractual relationships

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[2] The Order has been implemented by means of the "City of Boston Supplementary Minority Participation and Resident Preference Section," set forth in relevant part at A22-A29. While a contractor may be considered in compliance by a demonstration of "all reasonable steps" to comply, A25, there is no indication that a lack of available skilled resident workers will satisfy the requirement. The contractor is obliged, in fact, to train Boston residents as well as to employ them. *Id.*

between private parties, in order to carry out a purpose which is plainly protectionist of local economic interests. The City is choosing which persons, among the class of construction workers comprised of both residents and nonresidents, may compete for employment within a certain segment of the private construction industry. The Executive Order requires that City residents be eligible for 100% of the construction jobs, while any nonresident of the City, including any nonresident of the State, is limited in eligibility to only 50% of those positions.

The United States Constitution contains specific guarantees against discrimination, which were designed to protect each constituent member of the Federal Union from the petty jealousies of its neighbor States in matters affecting commercial and individual rights. The City Executive Order, by limiting the employment opportunities available to commuting nonresidents of the State, interferes with interstate commerce. The Order establishes an area of economic activity which is denied to those construction workers who cross state boundaries to engage in commerce, and which burdens the activities of those contractors who, by employing nonresidents of the State, engage in interstate commerce. The Order is, as a result, an inhibition upon interstate commerce and an exercise of economic protectionism, and falls under the *per se* rule of invalidity set forth in *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). Even under a less rigorous Commerce Clause analysis, the City has failed to demonstrate that the Executive Order achieves legitimate local purposes which could not be similarly promoted by non-discriminatory alternative means. *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979).

Nor may the City benefit from the exemption from Commerce Clause review afforded a State when acting as a market participant. *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). The City, through the terms of its Executive Order, employs its own contractual relationship with private parties to in

turn control, or regulate, further private contractual relationships to which the City is not a party. In so doing, the City functions far more as a market regulator than as a market participant, and thus disqualifies itself from the exempted area recognized in *Reeves*.

The analogue, in the area of personal rights, to the Commerce Clause's limitation on state discrimination in the area of commercial rights, is the Privileges and Immunities Clause of Article IV, § 2. That provision prohibits any State from discriminating in favor of its own citizens and disfavoring those of another State in their exercise of rights considered "fundamental" to the maintenance of the Federal Union. One such fundamental right under Privileges and Immunities analysis is the right to cross state boundaries "for the purpose of engaging in lawful commerce, trade or business." *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871). *And see*, *Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. 371, 386 (1978); *Hicklin* v. *Orbeck*, 437 U.S. 518, 525 (1978).

The Executive Order is not immune from Privileges and Immunities analysis simply because, by drawing a residence-based classification along city lines rather than state lines, it accomplishes a discrimination *greater* than the Clause envisions. Encompassed within the scope of the City's discrimination against all nonresidents of the City is its discrimination against all nonresidents of the State.

Argument.

1. Historically the Commerce Clause and the Privileges and Immunities Clause Were Drawn to Provide Protection Against Discrimination, Based Upon State Residency, in Economic Pursuits.

It has been an essential and overriding attribute of our national structure that there be explicit limitations upon the power of each State to discriminate against any other con-

stituent member of the Federal Union, or against its citizens. These limitations were inspired both by the concern for that social and political cohesion necessary and "basic to the maintenance or well-being of the Union," *Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. at 388, and by the desire to establish a free and unfettered national economy, in order to promote commercial productivity as well as to thwart "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

This principle of protection against discriminatory treatment of the citizens of one State by a co-equal sovereign member of the Federal Union finds its origins well prior to the creation of the Union itself.[8] In the Fourth of the Articles of Confederation, designed "to secure and perpetuate mutual friendship and intercourse among the people," the Framers sought to provide for a basic equality of treatment among the citizens of the different States with regard to individual rights and commerce. *See, Hicklin*, 437 U.S. at 532 n. 16. In the area of individual rights, that anti-discrimination princi-

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[8] Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487 n.1 (1981): In 1776, even before the American colonies became States, a committee of the Continental Congress, appointed to propose articles of confederation, drafted two articles protecting the inhabitants of one colony from discrimination by another. *See* Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 Wm. & Mary L. Rev. 1, 2-5 (1967). English law protective of "alien friends" is traced to the Magna Carta in R. Howell, The Privileges and Immunities of State Citizenship 9-13 (1918). According to Howell, by the time of the Articles of Confederation, "independently of any constitutional provision, the citizens of the thirteen original states were entitled to the enjoyment of a considerable class of privileges upon removal from their own to another State." *Id.* at 13. In his view, the constitutional provisions were drafted to extend the scope of these protections and render them more secure. *Id.*

ple was later carried over into the comity article of the Constitution, in the Privileges and Immunities Clause of Article IV,[4] in briefer form but with no change in substance or intent, unless "to strengthen the force of the Clause in fashioning a single nation." *Austin* v. *New Hampshire*, 420 U.S. 656, 661 (1975) (footnote omitted).

The interest in ensuring unrestricted trade among the States created a major impetus for the drafting of the Constitution, in part out of a recognition that the economic interests of the nation as a whole, and of each individual State as a consequence, lay in the establishment of such a truly national market. The Federalist, No. 11, (A. Hamilton) (J. Cooke ed. 1961) p.71; *see*, *id.*, No. 42, (J. Madison) p. 283; cited in *Reeves*, 447 U.S. at 448 (Powell, J., dissenting). But the Framers were also concerned over the fractionalizing forces of economic competition between the States, evidenced in discriminatory tax or regulatory burdens upon the commercial intercourse between them. Each State might, it was feared, "pursue a system of commercial polity peculiar to itself [which] would occasion distinctions, preferences, and exclusions, which would beget discontent. . . . The spirit of enterprise, which characterizes the commercial part of America, . . . would [not be likely to] pay much respect to those regulations of trade, by which particular states might endeavor to secure exclusive benefits to their own citizens." The Federalist, No. 7, (A. Hamilton) (J. Cooke ed. 1961) pp. 39-40 (emphasis in original); *and see*, *id.*, No. 22, (A. Hamilton) p. 137.

These principles have since been subsumed in the Federal Constitution's Commerce Clause,[5] and they have consistently

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[4] The Privileges and Immunities Clause holds that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." Art. IV, § 2, cl. 1.

[5] The Commerce Clause provides that "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ." Art. I, § 8, cl. 3.

informed judicial consideration of any state action which establishes a discrimination between the commercial interests of in-State and out-of-State residents. And by virtue of the common origin of both the Commerce Clause and the Privileges and Immunities Clause, and by their "shared vision of federalism," this Court has found a "mutually reinforcing relationship" between the two provisions. *Hicklin*, 437 U.S. at 531-32. As a result, a state law establishing an employment preference for in-State residents has been held violative of the Privileges and Immunities Clause, based in part upon the anti-discrimination and federalist principles found in case precedents under the Commerce Clause. *Id.* at 531-34. The "norm of comity" that is to prevail among the States with respect to their treatment of each other's residents, *id.* at 523-24, and that is ensured by the Privileges and Immunities Clause, and the economic prosperity promised by a national market, and reserved from state interference by the Commerce Clause, together serve a single ultimate goal: the maintenance of the Federal Union.

II. The City's Enforcement Upon Private Parties of a Hiring Quota For Local Residents Violates the Commerce Clause.

A. *The Executive Order Constitutes a Protectionist Measure Which is* Per Se *Invalid Under the Commerce Clause.*

The Commerce Clause embraces all interstate trade relationships, including alike "commerce by individuals, partnerships, associations, and corporations." *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869). Nor is it strictly limited in the scope of the activities it protects, for interstate commerce has been held to include "all the component parts of commercial intercourse among States." *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928). Even when legislating in areas

of legitimate local concern, States are subject to the limitations of the Commerce Clause. If a State law purporting to promote a valid local purpose is in reality "simple economic protectionism," a "virtually *per se* rule of invalidity is applied." *Philadelphia* v. *New Jersey*, 437 U.S. at 624. The cases have consistently held that the Commerce Clause precludes a State from mandating that its residents be given a preferred right of access, over out-of-State consumers, to natural resources located within its borders or the products derived therefrom. *New England Power Company* v. *New Hampshire*, _____ U.S. _____, 50 U.S.L.W. 4223, 4225 (February 24, 1982). The rationale behind these cases is, however, by no means restricted to instances of protectionist hoarding of natural resources.

It is a premise well established by the history of the Commerce Clause that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 802-03 (1976). Nor may the police power be used with the aim and effect of establishing an economic barrier against competition with the labor of another State's residents. *Baldwin* v. *Seelig*, 294 U.S. at 527. The principle was articulated by Mr. Justice Jackson for the Court in *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-38 (1949):

> As the Court said in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.

A court may find that a state law constitutes "economic protectionism" on proof either of discriminatory effect, *Philadelphia*, 437 U.S. at 626-27, or of discriminatory pur-

pose, *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977). But whatever the validity of the local purpose, it may not be accomplished by discriminating against foreign commerce, in the absence of some justifiable reason to treat such commerce differently, apart from its out-of-State origin. *Philadelphia*, 437 U.S. at 626-27.

That the City of Boston Executive Order is discriminatory and protectionist on its face,[6] in its objectives,[7] and in its effects,[8] is readily apparent. The Petitioner, however, argues that such a discrimination is not proscribed by the Commerce Clause when it is drawn not along state lines, but along city lines. Brief of Petitioners at 22.

A similarly protectionist city ordinance was struck down by this Court in *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951). The ordinance, which excluded from distribution within the City any milk not locally produced, was held "in practical effect" to exclude milk from out-of-State. That other in-State producers were also excluded was considered "immaterial." *Id.* at 354 n. 4. The City had erected an economic barrier protecting a local industry against competition from without the State, and in so doing impermissibly discriminated against interstate commerce. *Id.* at 354.

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[6] "... WHEREAS ... the City is intent on satisfying its statutory obligation to give preference to its residents in hiring ..., the worker hours on a craft-by-craft basis shall be performed ... at least 50% by bona fide Boston residents ...." Executive Order, A19-A20.

[7] The Order's objectives include "The promotion of the employment of residents of the City of Boston." Facts, para. 7, A35.

[8] The Order's effects include: "(a) The promotion of the employment of residents of the City of Boston ... (i) Unemployment of certain construction workers who are non-residents of the City of Boston and non-residents of Massachusetts who otherwise would have been employed ... and (j) Discouragement of some contractors located outside the City of Boston and some contractors located outside the Commonwealth of Massachusetts from bidding on public construction work ...." Facts, para. 9, A36-A37.

The rationale for such a holding is self-evident in the context of the purposes of the Commerce Clause. The national market considered by the Framers so vital to those principles of non-discrimination and economic prosperity embodied in the Commerce Clause are as readily undermined by legislation in piecemeal fashion as on a State-wide basis. Were every municipality in the Commonwealth held to have the authority claimed by the City of Boston, its exercise would carry the same effect upon out-of-State commercial interests as would a State-wide residents' quota.[9] The mere fact that the Executive Order is over-inclusive, that it accomplishes a discrimination even *greater* in degree than that which the Commerce Clause was designed to prevent, may not shield it from the enforcement of constitutionally recognized limitations upon its reach.

Nor is economic protectionism any less objectionable when cloaked in the guise of permissible local, social or public health purposes, for the evil of protectionism can reside in legislative means, as well as in legislative ends. *Philadelphia*, 437 U.S. at 626. A protectionist measure by its very nature produces local economic benefits. Whether those economic benefits may in turn translate into public health benefits, as in *Baldwin* v. *Seelig*, 294 U.S. at 522-23, or into the amalgam of economic, social, and racial harmony benefits claimed by the City herein, the measure which triggered them is equally repugnant to constitutional principles. As Justice Cardozo observed, when confronted with the argument that New York's milk embargo served to ensure an adequate supply of milk to promote the public health of its citizens:

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[9] A State-wide preference, as distinct from the City's quota, had been in effect in Chapter 149, section 26 of the Massachusetts General Laws, until struck down by the court below as violative of the Privileges and Immunities Clause of Article IV, section 2. A9-A13. The ruling with regard to the state statute has not been appealed. It was in part to satisfy its mandatory obligation under this statute to promulgate a complying local measure that the City issued its Executive Order. A19.

> Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. 294 U.S at 523.

The City of Boston's attempt to shut itself off from national economic troubles — to *export its own unemployment* by mandating the hiring preference of its own residents — offers no solution to the problem of unemployment. It simply forces upon others a greater share of the burden than market forces themselves would dictate. The Executive Order is in this respect the heir to that isolationist spirit which inspired a California statute prohibiting the transportation into the State of any indigent person. *Edwards* v. *California*, 314 U.S. 160 (1941). This Court found the measure an unconstitutional barrier to interstate commerce, holding it to violate "the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Id.* at 173. *And see, Philadelphia*, 437 U.S. at 627-28.

An attempt by the State of Iowa to accomplish an analogous result with regard to highway accidents was struck down in *Kassel* v. *Consolidated Freightways*, 450 U.S. 662 (1981). The truck length restriction, even though not discriminatory on its face, was held violative of the Commerce Clause because it shifted the burdens of large trucks to neighboring States. *Id.* at 676. The State was not permitted simply to export to its neighbors the hazards of interstate truck traffic. *Id.* at 686 (Brennan and Marshall, JJ., concurring). By the same token, the City of Boston may not be permitted to

reserve for its own citizens those employment positions which are available, and export the burdens of unemployment to surrounding communities and other States.

> The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition [citations omitted]; or to create jobs by keeping industry within the State [citations omitted]; or to preserve the State's financial resources from depletion by fencing out indigent immigrants [citation omitted]. . . .
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> What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. *Philadelphia*, 437 U.S. at 627-28.

B. *The Executive Order is Constitutionally Impermissible Even Under Traditional Commerce Clause Analysis.*

In recent years, this Court has utilized a three-part inquiry for Commerce Clause analysis:

> (1) whether the challenged statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and (3) if so, whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Hughes* v. *Oklahoma*, 441 U.S. at 336.

Under this standard, the burden of demonstrating discrimination rests on the party challenging the validity of the statute, but "when discrimination against commerce [is] demonstrated, the burden falls on the State to justify [its action]

both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* quoting *Hunt*, 432 U.S. at 353.

At a minimum, the facial discrimination of the Executive Order "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes* v. *Oklahoma*, 441 U.S. at 337. *And see, Smith* v. *Dept. of Agriculture*, 630 F.2d 1081, 1084 (5th Cir. 1980), *cert. den.*, 452 U.S. 910 (1981). Burdensome effects upon interstate commerce may, where the statute is drawn with an evenhandedness not evident here, and effectuates a legitimate state purpose, be held not to violate the strictures of the Commerce Clause. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 125 (1978).[10] But where a measure "displays a local favoritism or protectionism," its status under Commerce Clause analysis is significantly altered, and *Exxon* is *not* treated as controlling precedent. *Lewis* v. *BT Investment Managers*, 447 U.S. 27, 42 (1980). A State may not simply express an interest in local wealth, in any of its varied forms or with any of its concomitant social effects, and thereby avoid Commerce Clause limitations. *Id.* at 43-44.

The stated justifications for the City's Executive Order are either ill served by its discrimination, improper, or of too little substance to warrant such an intrusion into constitutionally protected areas. Unemployment of local residents may be remedied not at all, and if so merely by chance, by a requirement that local residents be hired *regardless of their own current employment status*. While there may be a valid local interest in upgrading human resources and in reducing unem-

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[10] Central to the holding in *Exxon*, however, was that the statute created no barrier to, and would result in no reduction of, the flow of petroleum products in interstate commerce. 437 U.S. at 126, 127. "The absence of a similar discrimination between interstate and local producer-refiners was a most critical factor in *Exxon*." *Lewis* v. *BT Investment Managers*, 447 U.S. 27, 42 (1980).

ployment, the residency requirement fails to do so except by deterring the in-migration of nonresident construction workers. The challenged provision offers no increase in the number of available employment opportunities; it simply limits the universe of those who may compete for them. Even if a State or municipal government were to attempt to ease its unemployment problem by forcing employers to discriminate against nonresidents — a policy which presents serious constitutional questions — the means by which it does so must be more closely tailored to aid the unemployed than is a measure granting an across-the-board preference to local residents regardless of employment status. *Hicklin*, 437 U.S. at 527-28.

Nor may a State or locality discriminate in the offer of public employment opportunities merely to save money. *State* v. *Wylie*, 516 P. 2d 142 (Alas. 1973). This "public coffer" theory was rejected in *Shapiro* v. *Thompson*, 394 U.S. 618, 632-33 (1969), and sharply criticized in *Krzewinski* v. *Kugler*, 338 F. Supp. 492, 498 (D.N.J. 1972). It is not City residents alone who contribute to the "public coffer" by means of sales, parking, and other taxes which apply to commuters. Note, "Municipal Employees Residency Requirements, and Equal Protection," 84 Yale, L.J. 1684, 1698 (1975). Nor is the Executive Order's hiring bias drawn to favor only those who pay state or local taxes. There is no guarantee that the resident employed under the Order will pay property taxes, will have an annual income sufficient to require his payment of federal or state income taxes, or will pay any more in sales or excise taxes than will his nonresident job competitor. There is, moreover, an inherent unfairness in requiring an employee, who provides a day's work for a day's pay, also to contribute to the economy of the City and to its tax base. Any governmental interest in such financial benefits "[is slight compared to the important interference with [the employee's] private rights." *Donnelly* v. *Manchester*, 111 N.H. 50, 52-53, 274 A. 2d 789, 792 (1971).

C. *The Executive Order Constitutes a Regulation of Interstate Market Forces, and Does Not Fit the Commerce Clause Exemption of* Hughes *and* Reeves.

In two recent cases, *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), the Commerce Clause has been held inapplicable, despite state actions having clear impacts upon interstate commerce. The City of Boston seeks refuge for its Executive Order within the narrowly limited Commerce Clause exception established by *Hughes* and *Reeves*. The Executive Order, however, fails to qualify on two separate but interrelated grounds.

First, the overreach of the Executive Order renders the City far more a market regulator than a market participant. By mandating the content of legal relationships between contractors and sub-contractors, the City is imposing a requirement upon private parties with whom it has itself no contractual relationship. Rather than simply to establish the terms of a primary contractual relationship — such as by the grant of a money subsidy, which then enters the stream of commerce wholly subject to the flow of market forces, as in *Hughes*; or by the sale of a product to a primary purchaser, who then may transmit the product along whatever intra- or inter-state lines the market may persuade, as in *Reeves* — the City seeks to control, or regulate, the employment relationships between private parties. The Order overreaches horizontally, as well, for it limits nonresident employment opportunities on construction projects with which the City's only relationship is as conduit for federal funds.[11] The City has no proprietary authority over projects being constructed for private purposes, by private contractors, and with federal funds.

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[11] At least two-thirds of the dollar value of projects to which the Executive Order applied in 1980 (approximately $34 million of the $54 million total) was associated with private development, in

Second, the Executive Order is *prohibitory* in nature, providing not a positive, but a negative, impact upon commerce, a distinction critical to this Court's holdings in *Hughes* and *Reeves*. It does not encourage commercial activity, acting as an inducement by offering a financial subsidy, as in *Hughes*, 426 U.S. at 809-10. Nor does the Executive Order play an essentially passive role by inserting, as in *Reeves*, a middle man whose additional costs simply compensate for the State's investment, risk, and industry. *Id.* at 444 n. 17. In *Hughes*, the automobile hulks remained within the State in response to market forces, including that exerted by the State's subsidy. 426 U.S. at 810. In *Reeves*, the State policy did not bar re-sale to out-of-State consumers, and therefore did not cut off access by nonresidents. 447 U.S. at 444 n. 17. Here, by contrast, the City has enacted a prohibitory order whose effect is, as to 50% of the employment opportunities on the designated projects, to construct a barrier to commerce across state lines. Those nonresident workers who are affected by the Order are barred from crossing state lines not by the force of free market factors, but by the simple prohibition of the Order.

The Commerce Clause has long been held to preclude efforts by any State to neutralize an advantage belonging to another — such as that associated with the higher level of construction skills of non-Boston residents — by imposing restrictive or prohibitory measures. *Baldwin* v. *Seelig*, 294 U.S. at 527. Such measures cause a distortion of the competitive interstate market and an alteration of consumptive patterns, with long-term effects incompatible with nationwide economic efficiency. J. Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487, 543-44 (1981). The Boston

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which *none* of the incidents of ownership, management, or construction inheres to the City. A42. Urban Development Action Grants (UDAG), for example, involve grants made by the federal Department of Housing and Urban Development for *private* development projects. The City simply acts as applicant-intermediary.

Executive Order impermissibly imposes an artificial rigidity on the economic pattern of the industry, *cf.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 146 (1970), by controlling the conduct of nonresidents. Our federal structure, and this Court's holdings in *Hughes* and *Reeves*, assume an important distinction between a State's modification of the burdens or benefits which it distributes among its own citizens, and the imposition of discriminatory terms on which those outside the State, over whom it has no authority, must deal with state residents. Varat, *supra*, at 545. The City of Boston may not use the leverage of access to City funds in order to bias private relationships in favor of parochial interests, any more than could South Dakota condition the sale of its cement upon an agreement that its private purchasers buy from, sell to, or employ only in-State residents. *Id.* at 564.

D. *The City's Executive Order is Not Exempted From Commerce Clause Review By This Court's Holding in* McCarthy *or* National League of Cities.

State activities involving "integral operations in areas of traditional governmental functions" are protected from Congressional action under the Commerce Clause. *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976). The City of Boston's activities, however, fall far short of those which *National League of Cities* was intended to immunize.

Neither the choice by a city government, nor for that matter by a State, of who shall be entitled to work for a private contractor involves the exercise of an authority essential to the governmental unit's ability to function as a government within the framework of the Federal Union. Whether that private contractor may work on a purely private project or on one involving some federal, state, or local funds, the construction work itself bears no relation to any "integral operations in areas of traditional governmental functions." *Id.* at 852. The federal statute at issue in *National League of Cities*, as distinct from the Executive Order in the case at bar,

threatened to displace the decisions of a State, *as employer*, with its direct employees, and thereby to "substantially restructure traditional ways in which the local governments have arranged their affairs." *Id.*, at 849.[12]

The attempt by the City to evade Commerce Clause review can fare no better than that of New York State in seeking to shelter the Long Island Rail Road. *United Transportation Union* v. *Long Island Rail Road Company*, U.S. , 50 U.S.L.W. 4315 (March 24, 1982). Just as the Railroad, even were it operated as a purely public function, implicated no State interest involving "functions essential to separate and independent existence," *id.* at 4317 n.11, so the City's interest in the employment relations between private parties involves none of the "essential attributes of sovereignty," and must fail the test enunciated in *National League of Cities*. *Id.* at 4317.

The determination of the City's own employment relations with at least certain of its direct employees, such as police, fire, and school employees, would be protected under the rule of *National League of Cities*, 426 U.S. at 851, and *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976), but neither holding intimates an extension of that rule into the area of private employment. *McCarthy* relied upon the existence of a direct employment relationship between a public body and a fire department employee to justify a greater degree of governmental control than over the citizenry at large. 424 U.S. at 646 n.6. Residency requirements for such positions as teachers and police have been upheld be-

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[12] By the City's interpretation of *National League of Cities*, a City requirement that no private construction employee on a project subject to the Executive Order may be granted the minimum wage and maximum hour protections of the Fair Labor Standards Act, — or more threatening still, that the Act's protections be provided only to those workers who are City residents — would presumably be permissible as exempt from federal Commerce Clause jurisdiction.

cause of the special relationship between their tasks and the fundamental obligations of a representative government to its constituency. *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1969). By contrast, construction and general labor for contractors on a city project "does not involve public service of a kind which is considered permanent, is not integral to the welfare of the community nor a public service relied upon by citizens of the community in their everyday life." *Berg* v. *City of Minneapolis*, 274 Minn. 277, 281, 143 N.W.2d 200 (1966).

III. The Executive Order's Discrimination Against Out-of-State Residents Renders it Violative of the Privileges and Immunities Clause

A. *A City Executive Order Excluding Out-Of-State Residents From Some Private Sector Employment on the Basis of Their Place of Residence Must Be Measured Under the Standard of The Privileges and Immunities Clause.*

The Court below considered that "it may be more difficult to find [in the Executive Order] a violation of the privileges and immunities clause because the discrimination adversely affects citizens of the Commonwealth as well." A13-A14. Faced with a clear violation of Commerce Clause principles, the Supreme Judicial Court engaged in no further analysis of Privileges and Immunities applicability. A14.[13] But the principles which guided the Framers, and which have found voice

[13] The court did *not*, as Petitioners have suggested, concede that "the heightened scrutiny of Article IV, § 2, simply does not apply." Brief of Petitioners at 24. In fact, the only case mentioned by the court in this regard, *Construction & Gen. Laborers Local 563* v. *St. Paul*, 270 Minn. 427, 431 134 N.W.2d 26 (1965), was cited for the proposition that a city ordinance mandating a hiring preference for county residents on city public works construction projects was struck down on privileges and immunities grounds, as well as on the basis of federal and state equal protection guarantees.

in the interpretive decisions of this Court, argue persuasively that the City of Boston Executive Order contravenes the promise of non-discrimination which is at the core of the Privileges and Immunities Clause.

By its very terms, the Privileges and Immunities Clause is not confined to discriminatory actions of a State, but ensures that no person shall suffer prejudice by reason of his State of residence. The purpose of the provision is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin*, 437 U.S. at 524; quoting *Paul* v. *Virginia*, 75 U.S. (8 Wall.) at 180.

The purposes of the Privileges and Immunities Clause are no less implicated when the discrimination is accomplished against out-of-State residents by means not of a state law, but of a municipal ordinance or Executive Order. When a municipality acts, it does so by virtue of the measure of state authority with which it is clothed. Its existence is purely derivative, as are the powers by which it governs. If the State be powerless to enact a measure discriminatory against out-of-State residents, so also is its subsidiary. To hold the City of Boston to have the power to enact by ordinance a measure prohibiting all non-Massachusetts residents from engaging in commerce within the City would be to grant the City a greater constitutional power than its parent, the State. Such a holding would also enable a collection of similar ordinances by every municipality in the State to accomplish the same result which by state statute would be deemed in violation of Article IV, §2. The result would be both illogical and contrary to the principles motivating the Privileges and Immunities Clause.

Moreover, out-of-State residents suffer from the same lack of political access to municipal decision-making as they do to state government. It is this absence of political accountability which has long been held an important consideration in enforcing the protections of the Privileges and Immunities

Clause. Since burdened nonresidents are not represented in the legislative halls of the State imposing the burden, judicial acquiescence in schemes establishing special burdens upon nonresidents would compel them to seek redress through their own State; but "to prevent retaliation was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Austin* v. *New Hampshire*, 420 U.S. at 662-63, quoting *Travis* v. *Yale & Towne Mfg. Co.*, 252 US. 60, 82 (1920).[14] By making nonresidency an improper premise for locating a special burden, the Privileges and Immunities Clause implicates "not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin*, 420 U.S. at 662. As great a threat is posed to that concept of federalism by a retaliatory measure enacted to neutralize the City of Boston's scheme — whether enacted State-wide by Rhode Island or New Hampshire, or City-wide by Providence or Portsmouth — as if created in response to a discriminatory state law.

B. *The City of Boston Executive Order Contravenes the Privileges and Immunities Clause.*

What has become the modern understanding of the reach of the Privileges and Immunities Clause was set forth in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), in which a South

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[14] The danger of retaliation and economic warfare feared by the Framers is fast being realized, as residents hiring preferences are beginning to proliferate. Twenty-four States now have some such provision in effect, while four state statutes have been struck down. And one State, Maryland, has enacted an openly retaliatory measure, which prohibits public works construction employment to any resident of a State whose laws prohibit the employment of Maryland residents. Md. Ann. Code, Art. 21, § 8-503 (1981). Note, "Construction Worker Residency Requirements: A Constitutional Response," 17 New Eng. L. Rev. 461 n.3 (1982).

Carolina law limiting commercial access by nonresidents to migratory shrimp within state waters was at issue. The statute was struck down by the Court in *Toomer*, as it created a discrimination based upon residence that was without substantial reason beyond the mere fact of nonresidence. The State failed to establish a sufficiently *unique* and *demonstrable* link between the state interests served and the discrimination practiced, and the absence of practical and less restrictive alternatives. *Id.* at 398-99. The test established in *Toomer* has since been applied to strike down an Alaska statute requiring a higher license fee for nonresident commercial fishermen, *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), and a Georgia law permitting only state residents to obtain abortions, *Doe* v. *Bolton*, 410 U.S. 179 (1973). While access to recreational hunting has not been considered a right "fundamental" within the meaning of the Privileges and Immunities Clause, *Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. 371 (1978), a State's interest in preserving its own resources must yield when, "without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." *Id.* at 386 (citations omitted). *See also*, *Hicklin*, 437 U.S. at 524, and cases cited.

When the fundamental right of economic opportunity in the pursuit of a livelihood is implicated, the Privileges and Immunities Clause places limitations upon a state's power to bias those employment opportunities in favor of its own residents. *Hicklin*, 437 U.S. at 525. In *Hicklin* an Alaska statute creating a hiring preference for *qualified* residents (as distinct from the Executive Order, whose quota requirement offers no regard for qualifications) in construction work associated with the State's oil and gas resources was unanimously declared unconstitutional. Citing the two-part test of *Toomer*, the Court held that there had been no showing that nonresidents were "a peculiar source of the evil" which the statute was enacted to remedy — namely, Alaska's high rate

of unemployment. Moreover, even if that showing were to be accepted as sufficient, the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent. The across-the-board grant of employment preference to all residents, employed as well as unemployed, was not properly tailored to the statutory purpose of reducing unemployment. 437 U.S. at 526-28.

The Executive Order creates precisely the sort of residence-based bias of employment opportunities which *Hicklin* and its predecessors found to interfere with a personal right held fundamental under the Privileges and Immunities Clause. The City can satisfy neither part of *Hicklin's* two-prong test.[15] While the alleviation of unemployment may be a legitimate local concern, there is no demonstration that out-of-State residents are a peculiar source of unemployment within the City. *Salla* v. *County of Monroe*, 423 N.Y.S.2d 878, 882, 399 N.E.2d 909 (1979), *cert. den. sub. nom.*, *Abrams* v. *Salla*, 446 U.S. 909 (1980) (State-wide employment preference on public works construction projects offends the Privileges and Immunities Clause).

There is no unique link between the interest served and the discrimination practiced, the "substantial" or "reasonable" relationship required by *Hicklin*. 437 U.S. at 527 and 526. The Order does not draw its preference in terms of unemployed residents, but only residents. If an *employed* resident should take a job provided to him by the mandated hiring preference, and leave behind a position not among those covered by the Order, or one from out-of-State, Facts, para. 9(h), A37, the unemployed resident gains no benefit thereby.

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[15] The burden of demonstrating that the challenged statute meets the required test appears, in light of *Toomer*, *Doe* and *Hicklin*, to have shifted to the discriminating State. *See*, *Hicklin*, 437 U.S. at 526-27; *Smith*, 630 F.2d at 1084; L. Tribe, American Constitutional Law 411 (1978).

This type of untargeted employment preference was considered by the *Hicklin* Court to bely the stated purpose of alleviating unemployment. *Id.* at 527-28. The City also touts the retention of economic benefits generated by expenditures of tax dollars, and the reward of those who funded them, but these are nothing more than impermissible state purposes descendent from the state ownership doctrine long ago rejected as an excuse for state action intruding upon fundamental individual rights. *Hicklin*, 437 U.S. at 528-29.

Nor is the stated purpose of alleviating racial tensions sufficiently linked to an Order which is itself totally devoid of reference or applicability to race. The goal of advancing minority employment by means of a racially-based hiring preference is, when justified, far more readily achieved by the minority preference provisions of the Order, which, as the court below acknowledged, are not challenged herein. A2 n.4, A3 n.8.

Not only is the Executive Order poorly focused on its stated goals, it will in fact have *harmful* effects upon the economy and upon consumers and taxpayers,by virtue of higher costs of public construction because of fewer competitive bids, and increased costs for those contractors who actually perform work covered by the Executive Order. Facts, paras. 9(j) and (k), A37. The additional expense and inefficiencies created by a residents' employment preference, by the mandatory hiring of inexperienced and less qualified employees and the resultant organizational disruption and inconvenience, will increase costs to private developers subject to the Order, as well as to the City and, hence, its taxpayers. *Cf.*, *Salla*, 423 N.Y.S.2d at 882-83. The impact of such a program will be far more harmful to the economic plight of the City and its residents than would be a program designed to promote employment by providing job training, encouraging new employment opportunities, or even limiting available employment opportunities to those who are currently unemployed. The

consequences of the Executive Order hardly secure the "community of intercourse" among the States that is the *raison d'etre* of the Privileges and Immunities Clause. *Id.* at 883.

Conclusion

The blight of unemployment is an ill which recognizes no political boundaries. It is not local, but national, in character. It is plainly evident from federal involvement in unemployment compensation, welfare, and a myriad of federally funded programs designed to provide job training, price supports, and other incentives to full employment, as well as from the daily headlines from across the country, that unemployment is a common responsibility and concern of the entire nation. A State may not simply export its unemployment by mandating the hiring of its own residents, nor may it impose the burden of alleviating unemployment solely upon the construction industry.

Vital to the national common market and that freedom from economic discrimination envisioned by the Framers, is the assurance that each citizen's economic standing in the interstate market be determined by the forces of an open, free market economy, and not by governmentally imposed prohibitions upon his activity, absent compelling local purposes not present in the case at bar. The City of Boston's Executive Order has impermissibly skewed those forces, in order, without proper justification, to favor its own residents. In so do-

ing, it creates the very threat of dispute and division which the Commerce Clause and the Privileges and Immunities Clause were intended to dispel.

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No. 81-1003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,
Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS COMMUNITY RENEWAL SOCIETY OF CHICAGO, INC.

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CONSENT OF PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Petitioners. Letters of consent have been filed with the Clerk of this Court.

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INTEREST OF *AMICI CURIAE*

The national and local organizations joining in this brief as *amici curiae* (see appendix) represent many sectors of American society concerned with the public interest.

Amici increasingly have become concerned about the continuing, systemic race discrimination that exists throughout the country. They also have been attentive to the desperate and often violent responses by the victims of this discrimination. The awesome predictions of the Report of the U.S. Commission on Civil Disorders in 1968,[1] that the country was moving toward two separate and unequal societies, one white and one Black, has assumed heightened contemporary relevance as the economic, social and political gap between Blacks and whites clearly continues to broaden.

Amici share a particular common concern about the continuing exclusion of Black and other minorities from jobs, skills training, and promotional opportunities, which is one of many sorry legacies of slavery and racial discrimination. They are aware that affirmative action plans like that contained in the Boston Mayoral Executive Order are important vehicles, and in many instances the only effective means, by which to begin the long process of remedying this historic exclusion.

Amici recognize that this Court is the ultimate guardian of the Constitution. Decisions of this Court not only affect the living corpus of American law but also the nature and character of American life. Indisputably, these are troubled times. There has been a rapid rise in the pervasive unwillingness of the American people and their institutions to address, much less resolve, racial problems. Amici, nonetheless, fervently share a mutual hope that this Court will reverse the judgment below in this case and advance, not set back, the struggle to rid our nation of the twin haunting spectres of racial discrimination and racial hatred.

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[1] *Report of the National Advisory Commission on Civil Disorders*, at 398. (1968)

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case presents this Court with yet another opportunity to review the validity of race conscious affirmative action policies adopted to alleviate a portion of the burden of racial oppression imposed by this country's tragic history.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978), presented the admissions policy of a state university's medical school which reserved a number of seats for qualified minority applicants for review. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) a voluntary agreement between a private employer and a union to reserve one-half of the seats in a newly established training program for minority employees was challenged. And, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court examined the affirmative action set-aside, "minority business enterprise" (MBE) provision in the Public Works Employment Act of 1977.

In this case, Respondents covertly seek the imprimatur of this Court to impair significantly, and to destroy ultimately, as a practical matter, the affirmative action efforts of a local government designed to eradicate one of the continuing vestiges of American slavery. To affirm the decision below would require this Court to deny present reality, the lessons of history, and the importance and intractability of America's continuing problems of race relations.

The narrow Commerce Clause arguments advanced by the court below and the briefs of the parties ignore or minimize the integral relationship between the challenged residents' preference and the more explicit affirmative action goals of the Mayoral Executive Order (hereinafter MEO).

Amici argue that when the provisions of the Boston MEO are read together, as they must be, it becomes

clear that the MEO does not violate the Commerce Clause. The de minimis or "incidental" burden imposed on interstate commerce clearly is outweighed by the Thirteenth Amendment reservoir of power for all levels of government to aid in the eradication of the badges and incidents of slavery. The well-documented, gross exclusion of Blacks and other minorities from the building construction industry is one of those badges and incidents that has survived slavery and perpetuates second class citizenship. Inclusion of the 50% residents' preference as one provision of the MEO was a reasonable response to the white racism and overt racial hostility that threatened effective implementation of the affirmative action plan. As such, the MEO falls well within the parameters of the remedial flexibility to which local governments are entitled when seeking to implement the mandate of the Thirteenth Amendment.

ARGUMENT

ARTICLE I §8 cl.3, THE COMMERCE CLAUSE, OF THE U.S. CONSTITUTION IS NOT VIOLATED BY THE BOSTON MEO REQUIRING A 50% CITY RESIDENTS PREFERENCE AS PART OF AN AFFIRMATIVE ACTION PLAN DESIGNED TO INCREASE THE EMPLOYMENT OPPORTUNITIES OF BLACKS AND OTHER MINORITIES ON PUBLIC WORKS PROJECTS CONTRACTED FOR BY THE CITY.[2]

The Commerce Clause does not explicitly prohibit all state regulation of interstate commerce. The clause merely grants to the U.S. Congress the power to regulate in interstate commerce.[3] Any limitations on state power to regulate in this area therefore must be implied from the nature of the power vested in Congress. *Sturges v. Crowinshield*, 17 U.S. 122, 193 (1819). Review of a state regulation affecting interstate commerce involves a three-tiered analysis: 1) Does the regulation only incidentally affect or discriminate against interstate commerce?; 2) Does the regulation serve a legitimate local interest?; and if so, 3) are there alternative means to effectuate this interest with no impact on interstate commerce? When questions 1 and 2 are answered affirmatively and question 3 negatively, the challenged state regulation should not be prohibited by the Commerce Clause.[4]

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[2] We support the position of Petitioners that the Commerce Clause does not even apply to the Boston MEO.

[3] Article I, Section 8, clause 3 states: "The Congress shall have power

> . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;".

[4] *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977); *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970); *Cities Services v. Peerless*, 340 U.S. 179 (1950); *Southern Pacific v. Arizona*, 325 U.S. 761 (1945); L. Tribe, *American Constitutional Law*, at 320-326 (1st ed. 1978).

A. The Boston MEO Serves A Legitimate Local Interest

1. *The Thirteenth Amendment Commands The Eradication Of All Badges And Incidents Of Slavery And Involuntary Servitude.*[5]

For nearly one hundred years, except on rare occasions, the nation has failed to acknowledge or define the new national substantive rights enacted when the Thirteenth Amendment abolished the institution of chattel slavery.[6] However, the U.S. Supreme Court has concluded that the Thirteenth Amendment not only authorizes Congress to outlaw all forms of slavery and involuntary servitude, in-

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[5] In this brief, *Amici* emphasize the excluded condition of Black Americans. Native Americans, Latino-Americans and Asian-Americans are also persons of color belonging to racial classes. Social scientists have defined minorities as groups of people " 'who, because of their physical or cultural characteristics, are singled out from the others in society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of society.' " G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* at 11 (4th ed. 1972) (emphasis added). Pursuant to Title VII of the Civil Rights Act of 1964, the United States Equal Employment Opportunity Commission requires reporting firms to provide periodic employment statistics on Blacks, Orientals, American Indians, and Spanish surnamed Americans. The EEOC has recognized these groups because they fit the social science definition. These other racial minorities also have been victimized by White supremacy—a relic of slavery—it is therefore appropriate to develop remedies which include these groups although they were not the original intended beneficiaries of the Civil War Amendments.

[6] A. Kinoy, *The Constitutional Rights of Negro Freedom*, 21 Rutgers L. Rev. 387 (1967) (hereinafter Kinoy I); A. Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on "Jones v. Alfred H. Mayer Company"*, 22 Rutgers L. Rev. 537 (1968) (hereinafter Kinoy II).

cluding all badges and incidents, but also contains a reflex or self-executing charter nullifying state laws upholding slavery and establishing universal civil and political freedom nationally.[7] These propositions reflect current controlling law that has been reaffirmed by this Court twice during the last decade.[8]

In fact, the only real issue left for debate is how to determine what is a badge or incident of slavery appropriate for Thirteenth Amendment remediation. The historic debate between Justice Bradley, writing for the majority, and Justice Harlan, dissenting, directly addressed this question. Justice Bradley viewed the badges and incidents of slavery limited to the literal, legal disabilities or trappings imposed on slaves "that interfered with their fundamental rights" of citizenship. 109 U.S. 3, 22.

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance

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[7] Civil Rights Cases, 109 U.S. 3, 20, 34-36 (1883).

[8] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976).

In *Jones*, the Court upheld an effort by Black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section one of this Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ." In resting judicial action upon this statutory basis the Court was forced to face the ultimate question of the source for Congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment " 'to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' " Kinoy II, *supra*, at 538, 539 (footnotes omitted).

> and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. *Id.*

This position was ahistorical and unsupported by the legislative history of the Thirteenth Amendment, but necessary to support a rejection of the Civil Rights Act of 1875.

Justice Harlan, on the other hand, urged a more expansive reading of what were badges and incidents based on the understanding that the Thirteenth Amendment completely overruled the odious racial inferiority and white supremacy theories enunciated in *Dred Scott v. Sanford*, 60 U.S. 393 (1856)

> . . . I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of [the Thirteenth] amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character. . . . 109 U.S. 3, 36 (citations omitted)

While it is important to note that it is the more expansive view of Justice Harlan which has withstood the test of time, the facts presented in this particular case fall within the parameters set by Justice Bradley and subscribed to in the *Jones* and *Runyon* opinions.

2. *The Well-Documented, Gross Exclusion Of Blacks And Other Minorities From The Building Construction Industry Is A Badge And Incident Of Slavery.*

The virtually total exclusion of Blacks from the economic mainstream was crucial to the maintenance of the slavery system.[9] The states collectively used their laws to deny Blacks any opportunity to own, rent, inherit or otherwise acquire property, to acquire marketable skills through gainful employment or to engage in trade or commerce.[10] This total deprivation of any basis for economic independence left slaves with no options but complete dependency on the masters' absolute control. Slaves were property.

Despite emancipation and the best intentions of the framers of the Thirteenth Amendment and the initial Civil Rights Acts, the Freedmen were not included in the American economic mainstream.[11]

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[9] A.L. Higginbotham, *In the Matter of Color*, at 9 (1st ed. 1978); W. Goodell, *The American Slave Code*, at 96 (1st ed. 1968); J.H. Franklin, *From Slavery to Freedom*, at 187 (3rd ed. 1969).

[10] See generally Goodell, *supra*.

[11] Slavery, at its root, was an economic phenomenon. Hence, it is not surprising that a prime concern of the framers of the Thirteenth Amendment was the economic well-being of newly freed Blacks. Congress was concerned that Blacks be accorded civil and political rights in order that they could protect and advance themselves economically. The Black Codes—i.e. the legislation passed in Southern states designed to return Blacks to a state of semi-slavery—was never from the mind of Congress in enacting the anti-slavery amendment. Representative Godlove Orth of Indiana acknowledged that something more than merely the right not to be held as property was involved in abolition and added that the right of "personal freedom without distinction" was involved. Ebon C. Ingersoll of Illinois stressed that the amendment would bring Blacks the right to enjoy the rewards of their labor. James Harlan of Iowa emphasized that the amendment would give Blacks the right to own property—and, strikingly, the right to protect and advance their property rights by the right to bring suit, testify in court and to speak and write freely. Cong. Globe, 38th Congress, 2d Sess., 143 (January 6, 1865); *See e.g.* 38th Congress, 1st Sess. 1463 (April 7, 1864); 38th Congress, 2d Sess., 487 (January 28,

In the years immediately following the conclusion of the Civil War, one southern state after another enacted

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1865). Though there was not unanimity in Congress regarding the plan of some legislators (Sumner, Thaddeus Stevens, George Julian, Benjamin Wade, *et al.*) to allocate land to the freedmen, there was recognition that "special measures" had to be taken if Blacks were not to fall back into a second-class economic status. Congressional reports and documents of that era are replete with this concern. House Executive Documents, Report of the Secretary of the Treasury on the State of the Finances for the Year 1864: General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen; [No. 3, 38th Congress, 1st Sess.] Senate Executive Documents, Preliminary Report Touching the Condition and Management of Emanicipated Refugees, Made to the Secretary of War by the American Freedman's Inquiry Commission; [No. 53, 38th Congress, 1st Sess. (1864)]. Senate Executive Documents, "Final Report of the American Freedmen's Inquiry Commission to the Secretary of War [No. 53, 38th Congress, 1st Sess. (1864)]. The Freedmen's Bureau was both the clearest expression of congressional concern about the economic plight of the freedom and the clearest expression of the reach of the Thirteenth Amendment. Though some have argued otherwise, it is certain that the Freedmen's Bureau was seen as a concrete realization of the anti-slavery amendment and was based upon it; *See* G. BENTLEY A HISTORY OF THE FREEDMEN'S BUREAU, at 117, (1st ed. 1955). This was the view of conservative, moderate and so-called "radical" Congressmen alike. This is also the view of the two leading authorities on the Freedmen's Bureau and post-bellum land reform. *Compare*, W. amendment and was based upon it; *See* G. BENTLEY, *A History of the Freedmen's Bureau*, at 117, (1st ed. 1955). This was the ROSE, *Rehearsal for Reconstruction: The Port Royal Experiment*, (1st ed. 1965); W. MCFEELY, *Yankee Stepfather: General O. Howard and the Freedmen*, at 199, 267 (1968); *See also*, MCFEELY, *Unfinished Business: The Freedmen's Bureau and Federal Action in Race Relations, Key Issues in the Afro-American Experience*, Vol. II, at 5 (Huggins, Kilson & Fox ed. 1971). Congress recognized and the Bureau proceed to implement the incontrovertible fact that thep eculiar status of Blacks as a result of slavery, necessarily meant that peculiar legislation had to be designed to fit their needs. In that sense, *the Freedmen's Bureau can be seen reasonably as an early form of what is known today as "affirmative action," Further, the fact that the architects of the Thirteenth Amendment alos authored the Freedmen's Bureau, is recognition of the sound constitutional basis for "affirmative action."*

Black Codes that locked Blacks into a subordinate status.[12] Employment practices deliberately were designed to confine Blacks to specific jobs in the labor market. In no area was the pressure more intense than in the skilled trades.[13]

Apprentice programs were practically all closed to Blacks by law or practice.[14] Only inferior racially segregated vocational education was available to Blacks, a situation which continued well into the 1970's.[15]

After the turn of the century, Black access to skilled craft training and/or jobs became even more restrictive as union control and influence increased in the labor

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[12] The enactment of the Black Codes regulated the conditions of freedmen's labor and subjected them to the control of their former masters or other white men. While these codes were abolished during the period of Reconstruction, they later reappeared. G. Myrdal, *An American v. Dilemma* at 228 (Harper & Row ed. 1962).

[13] See, *United Steelworkers of America v. Weber, supra,* at 195, fn. 1. By the end of the Civil War, 80% of all skilled tradesmen in the south were Black because slaves with skills had a greater market value and could generate more income. Spero and Harris, *The Black Worker,* at 16 (Atheneum ed. 1962); Myrdal, *supra,* at 1101.

For a full treatment of Blacks in the workplace during this period, see Spero and Harris, *supra*; Myrdal, *supra,* at 1097-1124.

A thorough discussion of Black workers during the period from World War I through World War II is found in Weaver, *Negro Labor, A National Problem* (1964); and of Blacks in labor unions in Marshall, *The Negro and Organized Labor* (1965); Marshall and Briggs, *The Negro and Apprenticeship* (1967); and Northrup, *Organized Labor and the Negro* (1944). For more recent discussions, see Hill, *Black Labor and The American Legal System: Race, Work and the Law* (1977), and Gould, *Black Workers in White Unions* (1977).

[14] Spero and Harris, *supra,* at 5-6; Myrdal, *supra,* at 887.

[15] Marshall, *supra*; *Weaver, supra*; Hall, *Black Vocational, Technical and Industrial Arts Education* (1st ed. 1973); State Advisory Committee, United States Commission on Civil Rights, *50 States Report,* (1961) (hereinafter 50 States).

market.[16] While the newer crafts were not quite as bad as some of the older ones,[17] many excluded Blacks by express constitutional provision or ritual requirement,[18] while others used a series of unwritten practices.[19]

As a result, Blacks have been unable to get a share of the increased skilled craft jobs and their numbers have decreased substantially from 1865-1940[20] and 1950-1965.[21] In spite of the enactment and enforcement of Title VII, the enforcement of federal, state and local Executive Orders, and the adoption of voluntary affirmative action;

> the effect of intentional and direct employment discrimination in the building trades continue [sic] to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunity of minorities and women is unfortunately quite small.

United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* at 94 (1976) (hereinafter Challenge) (footnote omitted).

The continuing relevance of discriminatory union practices already has been recognized by this Court. "Judicial

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[16] Myrdal, *supra*, at 1102.

[17] *Ibid*; Hill, *supra*, at 235-247.

[18] Karson and Radosh, "The American Federation of Labor and the Negro Worker, 1894-1949" in *The Negro and The American Labor Movement*, at 157-158, ed. Jacobsen (1st ed. 1968) (like the Machinist and the Boilermakers).

[19] *Ibid.* at 158; Marshall, "The Negro in Southern Unions" in *The Negro and the American Labor Movement*, at 145, ed. Jacobsen (1st ed. 1968).

[20] Myrdal, *supra*, at 1101; Northrup, *supra*, at 18-19.

[21] Marshall and Briggs, *supra*, at 3.

findings of exclusion from crafts on racial grounds numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, *supra*, at 195, fn. 1.[22]

The promise of the Thirteenth Amendment remains just that—a broken unfulfilled promise to recast the position of Blacks and other minorities in the economic and political life of America. The pernicious and persistent exclusion of Blacks from full participation in the skilled crafts and other positions within the building construction industry is the direct result of a cohesive system of stigmatization. In a society in which a person is measured, in large part, by their work, in quality, nature and remuneration, a direct consequence of this exclusion is the denial of "those fundamental rights which are the essence of civil freedom, namely the right to make and enforce contracts . . . and to inherit, purchase, lease, sell and convey property." *Civil Rights Cases*, *supra*, at 22. In addition, this exclusion refuels general white misperceptions that Blacks and other minorities are inferior. This, in turn, becomes self-perpetuating as the justification for continuing the exclusion not only in this area but throughout American society.[23] These consequences are the very essence of the badges and incidents of slavery that the Thirteenth Amendment demands be eradicated.

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[22] See also, Challenge, *supra*, at 58-94 (a summary of judicial findings of discrimination by craft unions).

[23] U.S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* (1981) (hereinafter Affirmative Action Statement).

3. *When The Provisions Of The Boston MEO Are Read Together And In Light Of The Totality Of Circumstances Surrounding Its Development And Implementation, The MEO Is A Reasonably Designed Affirmative Action Plan Rationally Related To Its Legitimate Thirteenth Amendment Interest.*

An accurate chronological history of the Boston MEO is noticeably absent from the record in this case. Neither the opinion of the court below, the Agreed Statement of Facts, nor the briefs in support of or opposition to the petition for certiorari fully develop this factual history. Yet this history is crucial to an understanding by the Court of the real issue posed by this case. The purposes of the residents preference cannot be appreciated fully separate from the purposes of the whole MEO. In this respect, the case is reminiscent of several other landmark cases presented to this Court for decision during recent terms.[24] But, there is a difference in this case. Defendant-Intervenor in this action, the Boston Jobs Coalition (hereafter BJC) virtually alone has labored to present and build an accurate and factually detailed record,[25] while alerting a broad based coalition of groups to the potential significance of this case for the practical future of local affirmative action plans. A brief recapitulation of the facts will make this clear.

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[24] The eight page trial record in Regents of the *University of California v. Bakke, supra* is now a legend, along with the University stipulation that Bakke would have been admitted if no special admissions program had existed. The absence of any readily available evidence of past racial discrimination by defendants in *United Steelworkers of America v. Weber, supra* led some of the current *amici* to file a motion to intervene before this Court on behalf of several Black workers at the Kaiser Gramercy, Louisiana plant.

[25] See generally, Motion of BJC, Inc. to intervene as Defendant and accompanying affidavit before the United States District of the District of Massachusetts (hereinafter Motion) and Brief for BJC, Defendant-Intervenors, on Complaint for Declaratory Judgment before the Massachusetts Supreme Judicial Court (hereinafter Brief).

Responding to pressure from the Black and Hispanic communities in Boston, the Mayor promulgated an Executive Order (hereinafter EO) requiring specific affirmative action contract provisions be incorporated into all construction contracts signed by any city department. Adopted on July 31, 1975, the order was entitled "City of Boston Supplemental Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program Contract Provision." Contractors and subcontractors were required to maintain a fixed per cent of minority participation in all jobs with preference to be given first to Boston, then Massachusetts, residents in certain job categories involving training opportunities. The 1975 EO noticeably increased minority employment on city-funded construction projects. Unfortunately, although predictably, it also exacerbated the well-known high level of racial tension in the city and actually resulted in several hostile physical confrontations between white and minority construction workers which were well publicized by the local media. Created in 1976, the BJC was a response to this situation. The main activities of BJC were devoted to finding a non-violent solution to these racial hostilities and alleviation of the racial tension. Revision of the 1975 EO to the form of the present challenged MEO was first proposed by the BJC in June, 1977, and finally signed into law by the Mayor on September 11, 1979, as a supplement to the 1975 EO, after three years of BJC meetings with the various interested groups.

The Respondents carefully framed their challenge to the residents' preference in total disregard to this history. They aggressively have resisted any attempts by Petitioners to introduce the alleviation of the aggravation of racial tension in the City of Boston as one of several purposes of the challenged Executive Order. In fact, Petitioners were forced to compromise significantly on this purpose in order to obtain an Agreed Statement of Facts (hereinafter ASF) (Petition, *supra*, at A30-A47). As a result only two paragraphs in the AFS address this critical issue.

This Court must not allow a patent miscarriage of justice to occur because of Respondents' questionable tactics in shaping the factual presentation of this case. The City of Boston not only had a protectable right to promulgate an affirmative action plan, but an arguable mandate to do so, pursuant to the Thirteenth Amendment, to help Black and other minority workers overcome historic exclusion from the construction trade industry. Unfortunately, many whites, particularly in the predominantly white working class neighborhoods of Boston, as a result, perceived minorities as a favored class who were stealing jobs from unemployed whites.[26] This perception encouraged a general escalation in white antagonism toward Blacks and specific physical confrontations between white and Black workers that jeopardized future enforcement of the EO. This was the political reality that the city had to face. Under the circumstances, separation of the residents' preference from the minority preference was not only reasonable, but actually necessary in order to make the affirmative action plan work at all. As clearly stated by Defendant-Intervenors

> the residency provisions have never had an existence or purpose separate from the minority and women preference provisions. Rather they have always been an integral part of an overall strategy to provide equal employment opportunities for minorities and women, to increase the employment of Boston residents on city-funded construction projects, and to calm the racial antagonisms which have had a very destructive effect upon life in the City of Boston. (Brief at 16)

By joining the residents' preference with the affirmative action provisions, the MEO gave white city workers

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[26] See *Brief*, at 15, indicating that in September, 1979, 62% of the jobs on city-funded construction projects were held by non-residents of Boston. It also is well-documented that the nepotistic recruitment policies and practices of the skilled craft unions have an exclusionary impact on anyone, Black or White, without pre-existing relationship to the unions. See, *Challenge*, *supra*, at 86-90.

enough of a stake to decrease their enmity and thus allowed effective implementation of the affirmative action provisions. A failure by this Court to reverse the decision of the court below would strangle the ability of other local government entities to implement effective affirmative action plans.[27]

B. The De Minimis Burden Imposed on Interstate Commerce By The MEO Is Clearly Outweighed By Boston's Thirteenth Amendment Interest.

The parties have stipulated that the MEO will have no significant impact on the interstate market. (Petition for Writ of Certiorari in the Supreme Court of the United States at A41 (hereinafter the Petition)) This would seem controlling. It is undue interference with the Congressional power to regulate interstate commerce that is protected by the Commerce Clause, not the speculative impact of a local regulation on a few particular interstate businesses. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

On the other hand, the Boston MEO constitutes a direct and substantial effort to implement the Thirteenth Amendment command to eradicate the badges and inci-

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[27] There has been a steady increase in racial violence around construction sites in New York City. The situation is so tense that unions are hiring armed guards for the sole purpose of preventing local minority job applicants from entering the work sites to apply for employment. The resulting violent confrontations have led a court to award both temporary and permanent injunctions. The only affirmative step presently being pursued to remedy this volatile situation emanates from the Mayor's office. The Mayor has created an Office of Construction Industry Relations to recommend ways in which he can fashion an executive order to reduce racial violence in the construction industry. The most promising suggestion has been promulgation of an executive order requiring proportional hiring of underprivileged city residents. Any decision upholding the Massachusetts Supreme Court decision clearly would stymie this initiative.

dents of slavery. Race-conscious affirmative action plans like the Boston MEO, to date, are the only effective method for breaking up interdependent and self-perpetuating institutionalized systems of racial exclusion.[28]

The parties have stipulated that the Boston MEO will increase the number of Blacks and other minorities who will be employed on affected public works construction projects[29] as well as diminish Boston racial tensions and hostilities.[30] The MEO will provide many Blacks and other minorities with their first real opportunity for training and employment in the building construction industry. For many, Black and white alike, the MEO will lead to their first interaction with someone of a different race, the first step in the long process of hopefully changing the negative racial stereotypical views of white workers.[31]

The Thirteenth Amendment fully supports the Boston MEO. Thirteenth Amendment power is not vested exclusively in the federal government.[32] As a constitutional self-executing charter of "universal civil and political freedom,"[33] to obliterate all "badges and incidents" of slavery, no specific grant of power need be made to the

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[28] Affirmative Action Statement, *supra*, at 3, 30-41.

[29] Petition, *supra*, at A36.

[30] *Ibid.*, at A37.

[31] See, generally, Myrdal, *supra*, at 3-157, 1099-1105; F. Jones, *The Changing Mood In America*, at 1-48 (1st ed. 1977).

[32] Within our federal scheme, the express enforcement power given to Congress by Section 2 of the Thirteenth Amendment is not a limitation on state power to enforce. It merely reflects the fact that the federal government can only act when the federal Constitution so states expressly or by implication. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[33] See Section A, part 1.

states to authorize enforcement. Such power is inherent in the residual or police powers of the state.[34]

This was made clear by supporters of the Thirteenth Amendment in post-ratification debates concerning the constitutionality of the Civil Rights Act of 1866 which was passed pursuant to Thirteenth Amendment authority. "So far as there is any power in the states to . . . enlarge or declare civil rights, all these are left to the states [by the Thirteenth Amendment and acts adopted pursuant thereto]. Cong. Globe, 39th Cong., 1st Sess. at 1832 (1866). Senator Trumbell also remarked about "local legislation" to "provide for the real freedom" of former slaves. *Id.* at 77. In addition, many supported passage of the Thirteenth Amendment because of their philosophical belief in "natural rights." The thought that individual states would be precluded in some way from effectuating the Thirteenth Amendment would have been an anathema to them.[35]

It also is instructive, to note how Representative Bingham, the prime framer of the Fourteenth Amendment, discussed the role of state governments in explaining the need for that amendment:

> The nation cannot be without that constitution, which made us one people; the nation cannot be without the state governments to *localize and enforce* the rights of the people under the constitution . . . *centralized power, decentralized administration expresses the whole philosophy of the American system.*

Cong. Globe, 42nd Cong., 1st Sess., Appendix at 85 (1871) (emphasis added)

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[34] *Leisy v. Hardin*, 135 U.S. 100 (1890); A classic explication on the police powers of the states can be found in E. Freund, *The Police Power* (1904).

[35] See J. tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 Cal. L. Rev. 171, 197-200 (1951); Buchanan, *A Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Houston L. Rev. 1, 18-21 (1974-75).

Since the Boston MEO is not in conflict with the Commerce Clause and effectively seeks to implement the mandate of the Thirteenth Amendment, it must be upheld.

CONCLUSION

Local governments are entitled to remedial flexibility when implementing Thirteenth Amendment policy. Since the present MEO imposes a de minimis burden on interstate commerce, a more attractive alternative would have to impose *absolutely no burden* on interstate commerce and promote the state interest just as well as the present MEO. Neither respondents nor the court below have met the burden of showing that any such alternative exists. The building construction industry consistently has refused to develop private voluntary efforts to increase the number of Blacks and other minorities employed.

An affirmance of the decision below in this case essentially would place Respondents in exclusive charge of insuring that, once and for all, more than a token number of Blacks and other minorities are employed successfully in the building construction industry—a responsibility which they have not fulfilled satisfactorily during the past 100 years.

Nor should the Court view the City of Boston as constrained by the same legal rules implicated in the badges and incidents of servitude which, for institutional reasons, arbuably might restrict a court. Other social institutions including state and local governments, are fully competent to go further. Compare, *Palmer v. Thompson*, 403 U.S. 217 (1971) with *Jones v. Alfred H. Mayer Co., supra.* "It is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory, and try novel social and economic experiments." *New State Ice Co. v. Liebmann* 285 U.S. 266, 311 (1932). It is especially appropriate that local governments have the power to experiment with remedies when they are attempting to insure fundamental rights.

The Boston MEO is admittedly such an experiment that clearly meets the test adopted in *Jones v. Alfred H. Mayer Co., supra* from *McCulloch v. Maryland, supra*:

> Let the end be legitimate, let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . .
> 392 U.S. at 443

The Boston MEO is constitutional. The decision below should be reversed.

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APPENDIX

AMICI STATEMENTS OF INTEREST

The *Affirmative Action Coordinating Center* (*AACC*) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations, as well as other groups have joined as *amici* in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber*, *Bakke*, and *Fullilove* cases.

AACC publishes an informational newsletter entitled *AACC News*. It is preparing several plain language publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs. We are especially interested in having affirmative action as one of the principles included in all public works contracts.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and

the Courts. We strongly believe that municipalities must be given the broadest possible latitude in fashioning remedies for racial discrimination. Such broad remedies are of particular importance during this period of high minority unemployment in urban area.

Local executive orders that link minority and women highering goals with local residency goals are constitutionally valid expressions of the national mandate against race and gender discrimination.

The *National Lawyers Guild* (NGL) was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to co-sponsor a *Bakke Amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

Community Renewal Society (CRS) is a one hundred year old independent agency in Chicago having close ties to business, community based organizations, and the churches. Its divisions publish the *Chicago Reporter* (an investigative monthly on Race and Poverty), assist communities in development projects, afford research and

technical assistance to neighborhood organizations and parishes. During the past five years it has convened representatives of city government, business labor, civic agencies, and community groups in a study of unemployment and the future of work in this maturing industrial city. CRS accepts a present role in fostering local initiatives for employment as federal programs recede. The Board of the Society voted to support Mayor Kevin White and the Boston Jobs Coalition in this challenge to Boston's residential hiring policy and local city initiatives generally.

Accion Latinomerica de Aurora is a grassroots organization that organizes around social issues of our town and we have a special interest in the very high unemployment rate among our people in Aurora. It is very important to our principal objectives that we provide residents in our town with the jobs that are in our town, and that preferential hiring of local residents on local jobs be upheld by this Court.

Asian Legal Services Outreach, Inc. is a service and advocacy organization involved in issues of discrimination and equal service t, residents of the Asian community, which includes the vital area of equal access to jobs without being excluded because of discrimination. It is vital that the residents of the Asian community, which includes the vital area of equal access to jobs without being excluded because of discrimination. It is vital that the residents of the Asian community be given jobs in their community as an effective way to address the issue of discrimination in hiring. Necessary to our purposes is that the preferential hiring of local residents on the local jobs be maintained.

Atlanta Working Women (AWW) is an organization of office workers founded to improve the working conditicns, wages, opportunities and respect for clerical workers in Atlanta and to challenge age, race, and sex discrimination. This case is important to us because it

allows for the possibility that the city could set a priority for jobs to be held by its residents which could alleviate the high unemployment problem which in Atlanta is particularly faced by Blacks.

The *Black American Law Student Association* (BALSA) is the national representative organization of Black Law Students. BALSA recognizes the need for black representation in city sponsored work programs. We believe that justice and Affirmative Action programs are severely threatened by cases like *White* which in turn adversely affects employment opportunities in our communities.

The *Camden Citizens Coalition*, a broad based coalition of neighborhood groups, tenant organizations, women's organizations, and single issue groups, would like to go on record in support of the BJC litigation. This case has great relevance for many cities, such as Camden and Boston, where unemployment coexists with nonresidential employment in city jobs.

The *Center for Third World Organizing* is a coalition of third world groups in the Bay area of California. We are behind this fight because very often in cities like Oakland the community residents are squeezed out of local jobs by surburban commuters especially in the public sector.

Citizen Action League is a statewide organization of low and moderate income Californians working for economic justice. We support the principle of preferential hiring of local residents as a vital democratic right and as an important element in rebuilding our cities in ways which benefit low and moderate income people.

West End Minnesota's *Community Organizations Acting Together* (COACT) is a group working to help facilitate local business projects in the acquisition of loans when those businesses agree to hire city workers in their

projects. Our goal is to effectuate affirmative action and to establish a self-regenerating tax base.

Concerned Citizens Congress of Northeast Denver (CCCNED) is a coalition of block clubs, civic associations, churches, and businesses from throughout Northeast Denver. In the past five years we have worked on issues ranging from city services to community reinvestment. Our constituency is made up of homeowners, renters, and merchants of all races.

The availability of employment opportunities is one of the most important issues we face in our community. We feel that the community should have access to local jobs, particularly if our tax money has helped generate those jobs. We strongly support the Boston Jobs Coalition in the case which is presently being considered.

Concerned Citizens of North Camden is a multiracial community organization in Camden, New Jersey of predominately poor and minority people with a high unemployment rate. We worked very hard to get an ordinance passed in Camden that guarantees that 40 percent of the jobs on local publicly subsidized construction projects would go to city residents. We feel such an ordinance is crucial in fighting discrimination and unemployment. Therefore we support implementation of preferential hiring of local residents on local jobs with public subsidies.

Hartford Area Rally Together (HART) is a multi-issue community organization whose constituency is low income residents of all races. Because it has become the priority of our organization to arrest the rising problem of unemployment confronting our membership, it is now crucial that we be successful in placing our members into jobs. Since we are committed to leveraging publicly subsidized jobs that are located in the neighborhoods of our members, we strongly support this amicus position.

H.A.C.E.R. (*Hispanic American Career Educational Resources, Inc.*) began in 1975 as a volunteer organiza-

tion to help Hispanic adults find educational and career opportunities.

In 1979, H.A.C.E.R., Inc. was incorporated as a nonprofit organization, in New York City, reinforcing its commitment to foster the full participation of Hispanics in the labor market of American society.

Since we are an organization that has an interest in many local jobs for our local residents, it's important to us that this Court reverse *White*.

The *Legal Aid Society of Dayton* has as one of its primary objectives working with low income residents of Dayton to find employment opportunities without being discriminated against because of their race or background. It is crucial for us to achieve our objectives in this regard through implementation of hiring policies that award local jobs to local residents by force of law.

The *National Association for the Advancement of Colored People* (NAACP) is the largest and oldest civil rights organization in the U.S., having been founded in 1909 as a New York state nonprofit corporation. The NAACP has a total number of 2400 adult and youth branches, located in every state and in every major city of the country. From its inception, the NAACP has been involved with complaints of racial discrimination by Blacks, including in such areas as housing, education, voting rights, criminal justice, public service, employment, and minority contracting. Through its Boston branch, we have been involved in employment discrimination litigation in federal court cases concerning education (*Morgan v. McKeigue*), housing and community development (*Boston NAACP* v. *H.U.D.*), and civil service (*Boston NAACP* v. *Beecher*, involving the Boston Fire Department and the state civil service commission). The members of Boston NAACP, like other members throughout the country, are directly affected by this litigation: the Boston NAACP members are among the specific intended

beneficiaries of the hiring policies adopted by the city of Boston which are the subject of this litigation; NAACP members in other urban communities throughout the country also stand to be directly impacted by the legal precedence made in this case, since they, too, tend to have been historically and to be at present excluded from jobs in the construction industry by rank discrimination based on race and/or color. To the extent city policies like those adopted by Boston are prevented from effectuation by challenges such as the one at Bar, the NAACP ability to represent its members' interests in nondiscriminatory employment opportunities on publicly-supported projects will be severely impaired. Thomas Atkins, Esquire is General Counsel for the NAACP's national office.

The *National Congress for Community Economic Development* (NCCED), the only membership association for community-based development corporations (CDCs) represents organizations that work to improve the conditions of poor and low-income individuals and the communities in which they live. This is accommplished primarily through the creation of permanent local jobs via a variety of economic and community development activities. It is the view of the NCCED that the key to the economic revitalization of economically distressed communities and expanded opportunities for poor people is local job creation. Local programs and policies such as the Boston Resident Job Policy that emphasize new jobs for local residents are consistent with the efforts of the NCCED's membership.

National People's Action is a grassroots coalition of thousands of neighborhood organizations in hundreds of cities and towns throughout the country.

In working with communities to arrest the epidemic tide of joblessness that has beset our urban neighborhoods, we have come, by experience, to highly value and have, in fact, found critical to our organizing success the

concept that the first claim on jobs must go to those who live in the immediate vicinity of that employment. In other words, neighborhood jobs for neighborhood people. City jobs for city people. It is for this reason that National People's Action fully supports the concept, policy and practice of a residency jobs policy as proposed and put into action by the Boston Jobs Coalition.

9 to 5 is an organization founded to fight the forces of discrimination that disallow women and minorities equal access to both traditional and nontraditional jobs. Finding the Boston Resident's Jobs Policy constitutional would further our progress.

The *North Central 7 Community Organization* is working to change the infrastructure in Michigan from dependence on the auto industry to a concentration on energy hardware. Our 10 year plan is in its embryonic stage although we have received support from the city officials. A residential jobs policy would greatly enhance our efforts.

The *Ohio Action Training Center* (OATC) provides technical and training assistance to community organizations and emphasizes organizing the unemployed in the local communities where they live. It is, therefore, crucial to our efforts that preferential hiring of local residents on local jobs be within the bounds of the law.

The *Oakland Community Organization* (OCO) works with residents of Oakland where there is a very high unemployment rate. We strongly support requirements for local residents to get first crack at the jobs available in their communities.

Peoples Housing Network in New York is concerned with the quality of living in New York City as it is determined by such factors as housing, education, and employment. A favorable decision on the position of the Boston Jobs Coalition in this case would significantly affect our pursuit for remedying unemployment caused by discrimination.

People Organized to Win Educational Rights (P.O.W.E.R.) is located in Richmond, California. Richmond is 60 percent nonwhite and the official unemployment rate for the residents is 18 percent. The major part of our community's tax base is generated by a single employer, 44 percent of whose employees commute from other parts of the county. In our struggle to rectify this situation, we are wholeheartedly in support of BJC's struggle in defending the constitutionality of a residential jobs policy for publicly funded construction projects.

Pilsen Neighbors Community Council in Illinois strongly believes that the preferential hiring policy in our locale would effectively make reparations for past discrimination in employment. We endorse the amicus position in this case.

The *Pittsburgh Neighborhood Alliance* is a nonprofit organization organized to make Pittsburgh a better place to live. As unemployment among Pittsburgh residents has been a serious problem, employment opportunities created by locally supported development must be directed to alleviate local employment needs. In our effort to combat the unemployment problem in Pittsburgh, we sponsored a "Jobs for Pittsburghers" campaign before our city council on March 23, 1982. It is essential to our objectives that BJC be supported in its effort to uphold the job policy to implement preferential hiring of local residents on publicly assisted jobs.

Rural America is a non-profit membership organization committed to improving the living and working conditions of small town and rural people. A major focus of our activities involves expanding the employment opportunities available to our members and other residents of the rural communities where they live; and to promote the economic self development of rural communities as the local residents feel necessary. We therefore support BJC's position before this Court.

The *St. Louis Association of Community Organization* addresses the concerns of various communities in St. Louis such as housing, public education, mass transit services and unemployment. We strongly believe that if a portion of local jobs are not given to local residents by force of law, when the jobs are publicly funded, we will be unable to regenerate our tax base to sustain the economic productivity here in the greater St. Louis area.

San Diego Organizing Project is a coalition of neighborhood groups working individually and as a coalition to improve or change their neighborhood with a particular interest in developing jobs for youth. Because our work involves finding jobs for youth in the community where they live, it is crucial that preferential treatment in hiring local residents be implemented to serve the objectives of the community we represent.

The *South Austin Coalition Community Council* (SACCC) is a grassroots neighborhood group in the predominately Black West Side of Chicago, where the unemployment rate is between 50 and 60 percent. Reinvestment initiatives are underway to rebuild the community. Jobs are a paramount issue for us in this redevelopment period. We anticipate implementing a residential jobs policy comparable to the one at issue here and we strongly support the Boston Jobs Coalition position in this case.

Southeast Women's Employment Coalition is a coalition of women's employment organizations in six southeastern states actively involved with monitoring the hiring of women in nontraditional jobs, especially federal highway construction. Because it is crucial to our goals that our constituency win the jobs located where they live. To enhance their hiring, the local jobs for local residents concept is necessary.

Southern Arizona Legal Aid is well acquainted with the discriminatory hiring practices in the public construc-

tion area that aggravates our unemployment rate. It is one of our primary objectives to insure by legal means that minorities and women are hired by the construction industry whenever such employers are assisted in their projects' completion with public monies acquired through our negotiations.

United Cannery Workers Committee is a rank and file committee of Chicano and Asian workers involved in discrimination issues in the cannery industry and local unions. We believe there should be preferential hiring of local residents on jobs in the industry within our communities to begin eliminating patterns of discrimination which we are resolved to fight against.

The *Urban Coalition of Minneapolis* is a private, nonprofit corporation which works on behalf of low income and minority pepole to alleviate conditions of poverty and discrimination and to empower economically and politically low income and minority people.

The Urban Coalition's interest in the issue of employment originated from the time of creation of the organization in 1968 and continues to the present. It has been our consistent belief and public position that publicly-assisted development projects should serve as a means of providing employment opportunities for low income, minority and women workers. In pursuit of this goal the Coalition has supported various affirmative action requirements in the city of Minneapolis and the State of Minnesota. Recently, the Coalition proposed to the Minneapolis City Council that in deciding which development proposals receive city assistance (tax increment financing, industrial revenue bonds, urban development action grants, etc.) preference be given to those proposals which make a commitment to hire the structurally unemployed (as defined by CETA eligibility criteria). The Council adopted a resolution to that effect on May 9, 1980.

The Coalition believes the case now before this Court could seriously jeopardize attempts such as that adopted

by the Minneapolis City Council. We therefore enthusiastically support the submission of the *amicus* brief in this case.

The *Urban League of Metropolitan Denver* is a community service agency particularly concentrating in the field of job placement. We have strongly urged programs and policies ensuring that local people have first option at locally generated jobs. In our city, minorities and poor people will be left out unless these policies are in place. It is crucial that preferential hiring of local residents be implemented.

Wilmington United Neighborhood is a broadbased organization of organizations, which is primarily composed of low and middle income people. It has been in existence for six years. Our major concern this year is unemployment because Wilmington has more Urban Development Action Grant money than any other city in the country but also has one of the highest unemployment rates for minorities. We are trying to develop a policy whereby minority residents would get employment in the job industries that receive public funding. The BJC brief and this amicus will expedite this process immeasurably if this court rules in its favor.

Women In Employment is devoted to placing women in nontraditional jobs from which they have been excluded because of discrimination in hiring. Because our organization stresses our membership getting placed in jobs in their own neighborhoods, it is vital that we pursue preferential hiring policies for our membership. Our work is primarily conducted in West Virginia.

The *American Friends Service Committee* (AFSC) has since 1917 been active in work of humanitarian relief and service, reconciliation among nations and people, and programs to overcome discrimination and to achieve social and economic justice. Our concern with equality and employment is long standing. For over 3 decades we have sponsored projects aimed at eliminating discrimination on account of race and sex. In Seattle in the 1970's we worked with an organization of minority construction workers seeking access to jobs in publicly funded construction projects. A major obstacle has been the heavy preponderance of workers from suburbs and nearby towns. A residency preference such as that in the Boston Executive Order would make an important difference in the struggle for fair access to jobs. Other AFSC work in support of employment rights of minorities and women has been carried on in five states of the Southwest and at the present time in Appalachia and North Carolina.

The following organizations agree that the principle of preferential hiring based on residency and affirmative action for minorities and women is essential to realizing the goals of their organizations; they join in unequivocal support of the BJC's efforts to defend the constitutionality of the executive order before this Court:*

Arizona Farmworkers Union, Association of Community Organizations for Reform Now (ACORN, New Orleans), Association of Farmworker Opportunity Programs (North Carolina), Citizens for Community Improvement (Iowa), The East Los Angeles Community Union, Farmworker Rights Organization, Portland West Neighborhood Planning Council (Maine), San Franciscans For Reasonable Growth, South Bethlehem Coalition (Pennsylvania), Washington Innercity Self Help, Working In Neighborhoods (Cincinnati).

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* Individual statements for each of these organizations were lost unavoidably.

Petitioner's Reply Brief

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No. 81-1003

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

PETITIONERS,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

REPLY BRIEF OF PETITIONERS

Summary of Argument.

No construction project to which Boston applies its resident employment preference is "private." When Boston applies its

preference only in the public works and urban development markets that the City itself creates by spending either its own revenues or revenues that it induces the federal government to make available, Boston is *not* a private-market regulator whose choices judges may review under the Commerce Clause.

Argument.

Remarkably, respondents seem to concede that the City's application of its local employment preference to any construction project on which the City is itself the developer — *i.e.*, any project that is financed "by City funds" and "to which the City is a signatory to the construction contract," Executive Order ¶1, Appendix to the Petition for Certiorari at A20 — is not subject to scrutiny under the Commerce or Privileges and Immunities Clauses. Respondents' brief nowhere denies that, when the City builds such public works as roads, schools, libraries, or little city halls, *see* Brief of Respondents at 4, it is — within the meaning of *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), and *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) — *participating in* — indeed *creating* — rather than *regulating* a market. Nor do respondents deny that such a use of city revenues to supply public needs fulfills a traditional governmental function. *See Reeves*, 447 U.S. at 447 n.1, 452 n.3 (Powell, J., joined by Brennan, White, and Stevens, JJ., dissenting).

Respondents have chosen to let their entire argument for applying the Commerce Clause and the Privileges and Immunities Clause[1] stand or fall with their assertion that the City

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[1] The Privileges and Immunities Clause is in no way violated by the City's resident-preference requirement, which does not on its face discriminate

applies its local preference primarily to construction projects they characterize as "private" — projects on which they say the City merely "formally sign[s] the application[s] for" federal subsidies in the form of Urban Development Action Grants (UDAGs). Brief of Respondents at 14. *See also id.* at 4, 5-6, 9, 15-16. Upon this assertion, respondents rest their conclusion

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against out-of-staters. *See* A13 (opinion of the Supreme Judicial Court) ("neither on its face, nor in fact, can the order be said to aim solely, or chiefly, at out-of-State residents"). *See also* Brief of Petitioners at 22 n.58, 24 & n.64. Respondents nonetheless claim that the Executive Order is subject to attack because approved by a political process in which "none of those against whom it discriminates were represented." Brief of Respondents at 34.

This claim ignores the fact that non-Bostonian citizens of Massachusetts *were* represented in the political process that led to the promulgation of Mass. G.L. c. 149, § 26, a statute which, in a section not contested below, *see* A3, and not at issue before this Court, directed each city "in the construction of public works . . . [to] give preference to . . . [its] residents." A2 n.3. Unlike a state preference aimed *only* at out-of-staters, such municipal preferences would disadvantage Massachusetts citizens along with out-of-staters. But Massachusetts citizens had an opportunity to participate in the legislative process that generated Mass. G.L. c. 149, § 26, and had an incentive to oppose such local preferences — namely, to avoid the potential restriction of their own employment opportunities in cities other than their own. This incentive ensured virtual representation for out-of-staters in that legislative process. *See South Carolina Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 187 (1938) ("The fact that [regulations] affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse").

Thus the Supreme Judicial Court's ruling on the validity of that portion of Mass. G.L. c. 149, § 26, that prefers in-state over out-of-state residents is not only not before this Court, but — contrary to respondents' assertion, *see* Brief of Respondents at 7 n.18 — it also has no bearing on the validity of the City's Executive Order, which was mandated by a different portion of that statute, a portion enacted under a set of "political restraints" different because of its adverse effects on *in*-state interests, *see Barnwell Bros.*, 303 U.S. at 184-85 n.2.

In any case, all of petitioners' arguments under the Commerce Clause apply with equal force to the Privileges and Immunities Clause, which thus will not be separately discussed in what follows.

that the City acts here as a market regulator, not as a market creator or participant.[2]

But this assertion is without support in this record,[3] and could not in any case sustain the Supreme Judicial Court's

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[2] It is upon this shaky foundation for applying the Commerce Clause that respondents build their weak structure of arguments for invalidating the City's resident-preference policy under that clause. That structure collapses upon analysis. *First*, relying on the Supreme Judicial Court's finding that the Executive Order "will have a significant impact" on firms employing out-of-state residents, A14, *see* Brief of Respondents at 21, respondents ignore the total failure of this record to establish *any* net burden on interstate *commerce* as such. Indeed, the actual data in the record, stipulated to be "representative," A44, reveal no reduction whatever in the percentage of out-of-state residents in City-funded construction projects after the October 15, 1979, effective date of the Executive Order, *see* A48, and show not a single firm actually pressured to withdraw from the City-funded construction market in Boston rather than undertake the marginal change in staffing that would be required to comply with the Executive Order.

Second, respondents — in suggesting that the Executive Order's sole *goal* is to decrease Boston's unemployment by exporting it, *see* Brief of Respondents at 17, 19-20; *but see infra* at 8-9 (Boston itself *creates* the employment claimed to be burdened) — utterly ignore *effects* that the parties stipulated the Order has (*e.g.*, integrating the construction labor force to reflect the City's population, reducing labor absenteeism and tardiness, and increasing Boston workers' skills), or may have (*e.g.*, increasing Bostonians' stake in and decreasing their antagonism toward construction projects), or might have been shown to have (*e.g.*, reducing racial tension arising out of a perceived favoritism for minorities in previous City affirmative action efforts). *See* A36-38. These effects were similarly, and erroneously, ignored by the court below, which held only that the Order was not narrowly enough targeted at the goal of reducing unemployment. *See* A15. Properly weighed against the minimal burden on interstate commerce shown on this record, these legitimate local ends would easily justify the Order's resident-preference policy. *See* Brief of Petitioners at 21-28. *See also* n.13 *infra*.

[3] Respondents appear to have predicated their entire argument on a single, ambiguous statement in the Agreed Statement of Facts: that, of the $54.4 million of 1980 construction "to which the Executive Order, by its terms, was applicable," $34 million "represented projects *involving* Urban Development Action Grants." A42, ¶18(b) (emphasis added). As respondents would have it, this $34 million consisted primarily of *private* investment in UDAG-

subsidized projects. But the record nowhere specifies the nature or components of this expenditure, about which other hypotheses are more plausible than respondents'.

First, there is no reason to suppose that the Executive Order *by its terms* is directly enforceable on all UDAG-subsidized private development projects. Massachusetts G.L. c. 149, § 26, *see* n.1 *supra*, refers to resident preferences *only* in the "construction of *public works*." A2 n.3 (emphasis added). And the Order by its terms extends only to contracts "to which the City is a signatory to the *construction* contract." A20 (emphasis added). While the City signs *grant agreements* with the developers to whom it administers UDAGs, it is not in the practice of signing *construction contracts* on UDAG projects. The City has entered into some *separate* agreements with developers that receive UDAGs, requiring resident preferences similar to those in the Executive Order — for example, in connection with the Copley Place project to which respondents erroneously suggest the Executive Order automatically applied, *see* Brief of Respondents at 14. Although this Court might of course view such separate agreements as tantamount to direct application of the Executive Order because obtained by the City's use of its weight in the bargaining process, those agreements were not before the court below, which considered only a facial challenge to the Executive Order itself, *see* A2-3 & n.4.

Second, $34 million is far less than the total dollar value of projected private construction leveraged by the $28.6 million in UDAGs awarded to Boston in 1980 — namely, $397 million. *See* UDAG Project Approval List, Region I, Department of Housing and Urban Development (HUD) (Boston, Ma., Feb. 9, 1982) at 1, *cited in* Brief of Respondents at 14-15. Thus paragraph 18(b) of the Agreed Facts, A42, simply does *not* imply that the Executive Order applies by its own terms to all the private development that UDAGs help fund in Boston, as respondents attempt to suggest in a flurry of extra-record facts, *see* Brief of Respondents at 14-16. For all this record reveals, the $34 million could just as well have represented only the City's *own* expenditures of *municipal revenues* — *e.g.*, on infrastructure improvements — made in connection with otherwise private projects "involving" UDAGs. After all, the City's capital outlays in fiscal 1980 totaled $55 million, of which $14.3 million was earmarked for economic development projects, including UDAG-subsidized projects. *See* Composition of City Funded Capital Outlays, 1960-1980, Boston Redevelopment Authority Research Dept. (Boston, Ma., Oct. 1980).

Nothing in petitioners' argument, however, turns on rejecting respondents' wishful reading of the record. For, as argued *infra*, even if the Executive Order *did* actually apply to *all* UDAG-subsidized projects, *none* of these projects could properly be characterized as "private" within the meaning of the Commerce Clause.

wholesale facial invalidation of the Executive Order's resident preference.[4]

Moreover, the City's resident-preference requirement would be immune from scrutiny *even as applied to UDAG-funded projects.* For the City, in obtaining and administering UDAGs, neither regulates nor merely enters a pre-existing private market; rather, the City supplies public needs by using public powers to *generate* a market that would not otherwise exist.

First, UDAG-funded construction, no less than more traditional "public works," serves special public purposes.[5] Congress designed UDAGs *not* to "encourage private enterprise," *see* Brief of Respondents at 15, but to attract the commitment of private investment for public relief.[6] A city cannot obtain a

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[4] At *most*, respondents' argument could suggest the possible invalidation of the Executive Order *only* as applied to construction jobs on the non-City-funded portions of those projects respondents characterize as private, *but see* n.2 *supra*; Brief of Petitioners at 21-28, and *only* if respondents could show that they have standing to claim demonstrable injury from such applications. *See Cabell* v. *Chavez-Salido*, 102 S.Ct. 735, 741 (1982). The court below did not even consider thus confining its holding, nor should this Court do so at this belated point.

[5] Indeed, the specific purposes to which the City applies UDAGs are sometimes classical "public works" themselves. For example, the City requested nearly $4 million of UDAG funds for infrastructure improvements to accommodate the Copley Place project — *e.g.*, for traffic routing and street modifications and water main relocations. *See* Copley Place UDAG Application to HUD Submitted by the City of Boston (April 10, 1980) (Copley Application) at 43, 63.

[6] Under the Housing and Urban Development Act of 1974, as amended, Congress authorized the Secretary of HUD "to make urban development action grants to cities and urban counties which are experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery." 42 U.S.C. § 5318(a). The primary objective was to "revitaliz[e] distressed communities through the creation or retention of jobs and the expansion of tax base." Legislative History of Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, *reprinted in* [1981] U.S. Code Cong. & Ad. News 396, 542.

UDAG without demonstrating that the project to which the funds will be committed will alleviate economic distress while helping the poor, minorities, and the unemployed.[7] Like a city's expenditure of its own capital to create jobs and construct municipal facilities, a city's procurement and expenditure of UDAG funds "to help stimulate economic development activity needed to aid in economic recovery," 24 C.F.R. § 570.450(a) — in their purposes if not in their mechanics[8] — lie at the core of the traditional governmental functions to which the *Reeves* Court unanimously found the Commerce Clause inapplicable, *see* 447 U.S. at 438 n.10; *id.* at 451 (Powell, J., joined by Brennan, White, and Stevens, JJ., dissenting).

Second, in exercising its public powers to sponsor, obtain, and administer UDAGs, the City is *not*, as respondents would creatively recast it, *see* Brief of Respondents at 14 & n.24, a mere siphon from the federal government to the private sector — a passive public conduit for federal largesse. On the contrary, the City plays an active role in *identifying* UDAG recipients to meet its public needs[9] and in *shaping* UDAG applica-

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[7] Current HUD regulations require that applications for UDAGs — which are available only to cities "experiencing severe economic distress," 24 C.F.R. § 570.450(a) — analyze the impact of a proposed UDAG-supported project "on the residents of any affected residential neighborhood, particularly low- and moderate-income persons and members of minority groups," *id.* § 570.458(c)(6), and on the "long-term unemployed and underemployed," *id.* § 570.458(c)(12).

[8] *Only* the federal source of funds distinguishes the City's deployment of UDAGs from the City's use of its own capital to spur urban development by attracting private investment, an alternative respondents evidently concede would be immune from scrutiny. This difference — merely one of fiscal mechanics — is, however, of no constitutional consequence. *See infra* at 9-10; Brief of Petitioners at 15-16 n.45. For the Commerce Clause was not intended "to provide the basis for questioning a State's right to experiment with different incentives to business" or with "different methods of encouraging local enterprise." *Alexandria Scrap*, 426 U.S. at 817 (Stevens, J., concurring).

[9] Prior to submission of a UDAG application, the City negotiates extensively with the potential developer it has chosen to ensure that the project

tions to fit those needs.[10] The City is indeed free to administer UDAG funds — which, once transferred to the City, are effectively the City's to apply as it chooses — so as to recapture them from private developers to reapply to future public concerns.[11] The City, like any other supplier of capital, conditions the use of and seeks a return on an investment — here, in the form not of profit but of public benefit. In this specialized capital market, the City surely has a "sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." *Reeves*, 447 U.S. at 438 n.10.

Third, when the City chooses to procure and deploy a specific UDAG, it is not merely *entering* a pre-existing urban development market. Rather, contrary to respondents' assertion, *see* Brief of Respondents at 16, it is *creating* a market that would not otherwise exist. *See Alexandria Scrap*, 426 U.S. at 815 (Stevens, J., concurring). For under federal law, UDAGs

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conforms with the public purposes the City expects the project to serve. *See, e.g.*, Copley Application at 16-89.

[10] Current HUD regulations require that a city applying for a UDAG, prior to submitting its application, "hold public hearings to obtain the views of citizens, particularly residents of the area in which the proposed activities are to be carried out." 24 C.F.R. § 570.454(a). Such citizen review can influence and even reshape the planned project. For example, the Copley Square Citizen Review Committee contributed recommendations — adopted by the City, *see* Copley Application at 37-38, 163-67 — that the Copley project accommodate public housing and subsidize space for community-oriented stores, be redesigned to meet certain environmental goals, and have certain hiring goals for construction and permanent employment.

[11] One means for so recapturing the public investment in UDAG-subsidized projects is for the City to administer the UDAG as a loan to the developer, *repayable to the City*. For example, Boston has chosen to administer its largest single UDAG — $18.85 million to support the Copley Place project — entirely as a loan, with the exception of grant money allocated directly to traditional municipal public works, *see* n.5 *supra*. Repayments of this Copley loan by the developer are to be placed in "an economic development fund to be used for neighborhood economic development projects citywide." *See* Copley Application at 40, 81-82.

are obtainable *only* for projects posing such risk that they would not be undertaken by the private market without an infusion of public funds. Indeed, any developer with whom the City has made a commitment to seek a UDAG must certify that, but for this public aid, the project would not be undertaken at all.[12] Thus the interstate commerce in construction labor that respondents say is burdened by Boston's resident-preference requirement *would not have existed* absent Boston's use of a special public privilege — the power to obtain UDAGs from the federal government — to attract investment capital for construction projects meeting local public needs. Far from exporting *un*employment, *see* Brief of Respondents at 17, the City's resident-preference policy conditions jobs the City has *created*. And "failure to create that commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business." *Alexandria Scrap*, 426 U.S. at 815-16 (Stevens, J., concurring).

Fourth, the application of the City's resident-preference policy to projects for which it acts as an indispensable procurer of *federal capital*, as well as to projects for which it furnishes the capital *itself*, cannot trigger otherwise inapplicable constitutional limits. How a city chooses to structure its provision of public benefits to its people must vary with its fiscal constraints. *See United Transportation Union* v. *Long Island Railroad Co.*, 102 S.Ct. 1349, 1354 (1982) (there can be no static historical view of which state functions are presumptively immune, as traditional governmental functions, from federal regulation). And "[w]hether [a state's] encouragement [of local industry] takes the form of a cash subsidy, a tax credit, or

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[12] 24 C.F.R. § 570.458(c)(14)(ii) requires that a city applying for a UDAG submit a certification by its "chief executive officer and the private participating party" that "the private development would not occur unless the public funding on which the development is based becomes available."

a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Alexandria Scrap*, 426 U.S. at 816 (Stevens, J., concurring).[13] It would be arbitrary to apply the Commerce Clause merely because the City expends its *labor* in obtaining federal capital, rather than directly expending only its own *capital*, as it might when its own revenue base allowed, to subsidize economic relief projects.[14] "It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse." *Reeves*, 447 U.S. at 441.[15]

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[13] Even if construed as a burden on interstate commerce, the City's resident-preference requirement adds no impediment to the interstate flow of labor that the federal government has not itself called for. 24 C.F.R. § 570.458(c)(14)(ix)(D) requires that UDAG applicants certify that they will comply with section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701u, and implementing regulations, 24 C.F.R. § 135.1(a)(2)(i), which in turn require that "to the greatest extent feasible opportunities for training and employment arising in connection with [a federally funded housing, urban planning, development, redevelopment or renewal project] be given to lower income persons *residing in the area of such project* . . . " (emphasis added). The same requirement applies to recipients of certain other forms of federal assistance to public construction. *See, e.g.*, 13 C.F.R. § 305.54(a) (Commerce Department regulations pertaining to direct grants and loans) ("The maximum feasible employment of local labor shall be made in the construction of public works and development facility projects . . ."). *See also* Petition for Certiorari at 20-21 n.28.

This "correspond[ence] to [an] identifiable congressional policy," *see Plyler* v. *Doe*, 102 S.Ct. 2382, 2399 (1982) (Equal Protection Clause), furnishes independent support for the constitutionality of the City's resident-preference policy. *See also Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946) (Commerce Clause).

[14] It is, in any case, one of the City's goals in directing construction jobs to its residents to recoup for Bostonians "some direct benefit" from the City's expenditures on public works from "federal, state and city taxes paid by Boston residents." *See* Preamble to Executive Order, A19. *See also* A7 (opinion of the Supreme Judicial Court) (one goal of the Executive Order is "to ensure that the expenditure of local funds results in maximum benefits to the locality where the monies are raised"); Brief of Petitioners at 15 n.45.

[15] And, even if applied, the Commerce Clause would not bar the City's challenged actions. *See* n.2 *supra*.

Conclusion.

The City does not regulate but participates in and indeed creates a market not only when it expends its own public revenues on public works, but also when it places its official weight behind procurement of critical federal financing for public relief projects. In conditioning its performance of either of these public functions on compliance with its local-hiring preference, the City is immune from Commerce Clause and Privileges and Immunities scrutiny. The decision below should therefore be reversed with respect to *all* applications of the Executive Order suggested by this record.

Even if this Court agrees with respondents that the City acts as a mere market regulator when it applies for, structures, and reinvests returns on federal subsidies for public relief projects, the decision below must nonetheless be reversed because, and insofar as, it invalidated the City's local-hiring preference *in its entirety* — even as applied to public works funded solely by the City itself, a category to which respondents apparently concede the Commerce and Privileges and Immunities Clauses do not apply.

Finally, because the City's resident-preference policy does not in any event unreasonably burden or discriminate against out-of-state or interstate commerce — and because, insofar as federal funds are involved, Congress has itself dictated the very preference that respondents would have this Court con-

demn as causing an undue burden — the judgment invalidating the City's policy must be reversed.

Respectfully submitted,

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Docket Sheet

NO. 81-1003-CFX	TITLE Kevin H. WHITE, etc., et al., Petitioners v. Massachusetts Council of Construction Employers, Inc., et al.

DOCKETED	COURT
Nov. 25, 1981	Supreme Judicial Court of Massachusetts

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Laurence H. Tribe
	Counsel for Respondents: Paul J. Kingston
Nov. 25, 1981	Petition for writ of certiorari filed. (Record filed).
Dec. 30, 1981	Brief for the respondents in opposition filed.
Jan. 6, 1982	DISTRIBUTED. 1-22.
Jan. 15, 1982	Reply brief for the petitioners filed. (D).
Jan. 25, 1982	Petition GRANTED.

Feb. 12, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Apr. 26, 1982.
Apr. 14, 1982	Order further extending time to file the joint appendix and petitioners' brief on the merits until May 3, 1982.
May 3, 1982	Brief, amici curiae, of The Affirmative Action Coordinating Center, et al. filed.
May 5, 1982	Joint appendix filed.
May 5, 1982	Brief for the petitioners filed.
May 19, 1982	Order extending time for the respondents to file their brief on the merits until July 2, 1982.
July 2, 1982	Brief, amicus curiae, of The Chamber of Commerce of the United States filed.
July 2, 1982	Brief of respondents filed.
July 7, 1982	Brief, amici curiae, of New England Legal Foundation, et al. filed.
July 2, 1982	Motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae filed.
Aug. 25, 1982	CIRCULATED.
Sept. 9, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae, is GRANTED.
Oct. 14, 1982	Reply brief of petitioners filed.
Nov. 1, 1982	ARGUED.